

CUSTOMS BULLETIN AND DECISIONS

***Weekly Compilation of
Decisions, Rulings, Regulations, Notices, and Abstracts
Concerning Customs and Related Matters of the
Bureau of Customs and Border Protection
U.S. Court of Appeals for the Federal Circuit
and
U.S. Court of International Trade***

VOL. 40

JUNE 21, 2006

NO. 26

This issue contains:

Bureau of Customs and Border Protection

CBP Decision 06-15

General Notices

U.S. Court of International Trade

Slip Op. 06-83

Slip Op. 06-85 and 06-86

Abstracted Decisions:

Classification C06/13 Through C06/17

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs and Border Protection, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

**Please visit the U.S. Customs and Border Protection
Web at: <http://www.cbp.gov>**

Bureau of Customs and Border Protection

CBP Decisions

19 CFR PART 101

CBP Dec. 06-15

USCBP-2005-0001

CLOSING OF THE PORT OF NOYES, MINNESOTA, AND EXTENSION OF THE LIMITS OF THE PORT OF PEMBINA, NORTH DAKOTA

AGENCY: Bureau of Customs and Border Protection; Department of Homeland Security.

ACTION: Final Rule.

SUMMARY: This rule amends the Department of Homeland Security regulations pertaining to the field organization of the Bureau of Customs and Border Protection by closing the port of entry of Noyes, Minnesota, and extending the limits of the port of entry of Pembina, North Dakota, to include the rail facilities located at Noyes. The closure and extension are the result of the closure by the Canadian Customs and Revenue Agency of the Port of Emerson, Manitoba, Canada, which is located north of the Port of Noyes, and the close proximity of the Port of Noyes to the Port of Pembina.

DATES: Effective July 10, 2006.

FOR FURTHER INFORMATION CONTACT: Dennis Dore, Office of Field Operations, 202-344-2776.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 12, 2005, the Bureau of Customs and Border Protection (CBP) published a Notice of Proposed Rulemaking (NPRM) in the

Federal Register (70 FR 47151) proposing to close the Port of Noyes, Minnesota, and extend the limits of the Port of Pembina, North Dakota, to include the rail facilities located at Noyes. The reason for the proposed rulemaking was that on June 8, 2003, the Canadian Customs and Revenue Agency closed the East Port of Emerson, Manitoba, Canada, which is located north of the Port of Noyes. The factors influencing their decision to close the Port of Emerson included the age of the facility, the close proximity of a port at Emerson West, declining workload, and resource considerations. The Port of Noyes, which is located two miles from the CBP Port of Pembina, processes on average three trucks, 50 vehicles, 154 passengers and three trains per day. CBP did not receive any comments on the NPRM.

As part of a continuing program to utilize more efficiently its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, CBP is closing the Port of Noyes and extending the limits of the Port of Pembina as proposed. CBP is extending the limits of the Port of Pembina to encompass the railroad yard located at Noyes, Minnesota, owned by the Canadian Pacific Railway and the Burlington Northern Santa Fe Railway. The Port of Pembina will assume responsibility for processing trains as they arrive at Noyes. However, other traffic must utilize the border crossing within the City of Pembina and will no longer be processed at Noyes. The office facility at Noyes will continue to be used to support the needs of several Border Patrol agents and Immigration and Customs Enforcement (ICE) agents. Security gates and surveillance cameras have also been installed at the Port of Noyes to ensure continued remote monitoring of that location by the Port of Pembina.

NEW PORT LIMITS OF THE PORT OF PEMBINA, NORTH DAKOTA

Accordingly, CBP is amending 19 CFR 101.3(b)(1) to reflect that the new limits of the port of entry of Pembina, North Dakota, are as follows:

City of Pembina, North Dakota, and the rail facilities located at Noyes, Minnesota.

AUTHORITY

These changes are being made pursuant to 5 U.S.C. 301 and 19 U.S.C. 2, 66 and 1624, and the Homeland Security Act of 2002, Pub. L. 107-296 (November 25, 2002).

CONGRESSIONAL NOTIFICATION

On September 15, 2003, the Commissioner of CBP notified Congress of CBP's intention to close the Port of Noyes, Minnesota, fulfilling the congressional notification requirements of 19 U.S.C. 2075(g)(2) and section 417 of the Homeland Security Act (6 U.S.C. 217).

THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

With DHS approval, CBP establishes, expands and consolidates CBP ports of entry throughout the United States to accommodate the volume of CBP-related activity in various parts of the country. This regulatory action will not have a significant economic impact on a substantial number of small entities. Accordingly, it is certified that this document is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

In addition, DHS and the Office of Management and Budget have determined that this final rule does not constitute a significant regulatory action as defined under Executive Order 12866.

SIGNING AUTHORITY

The signing authority for this document falls under 19 CFR 0.2(a). Accordingly, the final rule is signed by the Secretary of Homeland Security.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs ports of entry, Exports, Imports, Organization and functions (Government agencies).

AMENDMENT TO THE REGULATIONS

For the reasons set forth above, 19 CFR part 101 is amended as set forth below.

1. The general authority citation for part 101 continues to read and the specific authority citation for § 101.3 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

Sections 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b;

* * * * *

§ 101.3 [Amended]**2. Amend § 101.3(b)(1) as follows:**

a. Under the state of Minnesota, remove the entry "Noyes" from the "Ports of entry" column and the corresponding entry "E.O. 5835, Apr. 13, 1932." from the "Limits of port" column; and

b. Under the state of North Dakota, adjacent to Pembina, add in the "Limits of port" column the citation "CBP Dec. 06-15".

Date: June 2, 2006

MICHAEL CHERTOFF,
Secretary.

[Published in the Federal Register, June 8, 2006 (71 FR 33235)]



General Notices

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.

Washington, DC, June 7, 2006

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
*Acting Assistant Commissioner,
Office of Regulations and Rulings.*

19 CFR PART 177

PROPOSED MODIFICATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN WIRE HARNESSSES AND NAFTA ELIGIBILITY

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed modification of two ruling letters and revocation of treatment relating to the classification of certain wire harnesses and North American Free Trade Agreement (NAFTA) eligibility.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify two ruling letters relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain wire harnesses and their eligibility as originating goods under the NAFTA. Similarly, CBP proposes to revoke any treatment previously accorded by it to substantially identical transactions. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before July 21, 2006.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark of the Trade and Commercial Regulations Branch at (202) 572-8768.

FOR FURTHER INFORMATION CONTACT: Heather K. Pinnock, Tariff Classification and Marking Branch, at (202) 572-8828.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to modify two ruling letters relating to the tariff classification of certain wire harnesses and the eligibility of treatment as originating goods under NAFTA. Although in this notice CBP is specifically referring to the modification of Headquarters Ruling Letter (HQ) 546674, dated April 16, 1998, (Attachment A) and HQ 957188, dated February 9, 1995, (Attachment B), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found.

Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625 (c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved with substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ 957188 and HQ 546674, CBP stated that, "[t]he proper interpretation of the tariff shift requirement of General Note 12(t)/85.147(B), HTSUS, is that the non-originating materials must change to subheadings 8544.11 through 8544.60, from any other subheading within that group or headings 7408, 7413, 7605, or 7614, whether or not there is a change from any other subheading, provided the regional value content requirement is met." Based on our recent review of HQ 957188, HQ 546674, and General Note (GN) 12(t)/85.147(B), HTSUS, we have determined that the tariff shift analysis in HQ 957188 and HQ 546674, performed pursuant to GN 12(t)/85.147(B), HTSUS, is incorrect. It is now CBP's position that GN 12(t)/85.147(B), HTSUS, requires that, in order for a transformation/tariff shift to occur there must be a change in the tariff classification of a good to subheadings 8544.11 through 8544.60 from heading 7408, 7413, 7605 or 7614, HTSUS, and the good must also have a regional value content of not less than 60% where the transaction value method is used, or 50% where the net cost method is used. A change to subheadings 8544.11 through 8544.60, HTSUS, from any other subheading, including another subheading within subheadings 8544.11 through 8544.60, HTSUS, may only take place if there is also a change in classification of the good from heading 7408, 7413, 7605 or 7614, HTSUS.

Pursuant to 19 U.S.C. §1625(c)(1), CBP intends to modify HQ 957188 and HQ 546674, and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper tariff shift requirements pursuant to the analysis set forth in proposed Headquarters Ruling Letters (HQ) 968072 (Attachment C) and HQ968074 (Attachment D). Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions that are contrary to the determination set forth in this notice. Before tak-

ing this action, consideration will be given to any written comments timely received.

DATED: June 2, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 546674
April 16, 1998
RR:IT:VA 546674 KCC
CATEGORY: Valuation

MR. DONALD PFEIFFER
PRETTL ELECTRIC CORPORATION
1721 White Horse Road
Greenville, South Carolina 29605

RE: Article 509; NAFTA; wire harnesses; automotive good; insulated wire; originating good; non-originating good; tariff shift requirement; de minimis; ☐2, 5 and 9(1) of the NAFTA Rules of Origin Regulation; traced material; light-duty automotive good; Schedule IV of NAFTA Rules of Origin Regulation; non-originating material's value

DEAR MR. PFEIFFER:

This is in regard to your letter dated February 19, 1997, concerning the applicability of the North American Free Trade Agreement (NAFTA) to wire harnesses when imported into the United States. We regret the delay in responding.

FACTS:

Prettl Electric Corporation (Prettl) is transferring part of its production of wire harnesses for the automotive industry to its Mexican subsidiary. In the manufacture of these wire harnesses, Prettl will use both originating and non-originating materials. The Mexican subsidiary will manufacture the wire harness, as described below, and export the finished wire harnesses into the U.S. You state that the completed wire harnesses when imported into the U.S. are classified under subheading 8544.30.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "[i]gnition wiring sets and other wiring sets of a kind used in vehicles, aircraft or ships." The following components are incorporated into the completed wire harnesses:

Component Made in HTSUS ☐ housing USA subheading 8536.69 ☐ gold male terminal USA subheading 8536.90.006 ☐ tin terminal USA subheading

8536.90.006 □ red spacer USA subheading 8538.90.600 □ silicon rubber tube Germany subheading 4009.30.000 □ white insulated wire USA or Germany subheading 8544.59.400 □ black insulated wire USA or Germany subheading 8544.59.400 □ gray insulated wire USA or Germany subheading 8544.59.400 □ metal cap USA subheading 8708.10.001 □ plastic grommet Germany subheading 3926.90.4590 □ rubber bushing seals USA subheading 4016.93.000.02 □ rubber o-ring seal China subheading 4016.93.5050 □ connector terminal Germany subheading 8536.90.0060

The first step in the manufacturing process is a simultaneous operation executed in one machine where the black insulated wire (x1) is cut according to specification and the gold male terminal is crimped on one side. This same operation is repeated for the gray insulated wire (x1) and the white insulated wire (x1) with the only difference being that the white insulated wire receives the tin terminal. Next, the silicon rubber tube is cut according to length. Thereafter, the four plug wire is connected to the housing, thread through the tube and the red spacer is inserted into the housing. This assembly operation is manually completed by one operator. The protection cap is assembled by inserting the rubber o-ring seal on the plastic grommet which is pressed into the metal cap. The other insulated wire ends are inserted into the grommet. Then, one bushing seal is assembled on each insulated wire and pulled into the grommet. Last, the connector terminal is crimped onto each insulated wire. After assembly, the wire harnesses are inspected for quality control, packaged in plastic and imported into the U.S.

ISSUE:

Are the wire harnesses considered to be "originating goods" pursuant to the NAFTA rules of origin?

LAW AND ANALYSIS:

□4 of the NAFTA Rules of Origin Regulations, Appendix to Part 181, Customs Regulations (19 CFR Appendix to Part 181) sets forth the rules for determining whether a good originates in the territory of a NAFTA Party. For example, a good will originate if it was "wholly obtained or produced" in accordance with □4(1) of the NAFTA Rules of Origin Regulations, or if it satisfies the applicable change in tariff classification, the applicable regional value calculation (RVC) requirement or combination thereof under □4(2) of the NAFTA Rules of Origin Regulations, to cite but a few possibilities.

As the wire harnesses are classified under subheading 8544.30.00, HTSUS, a transformation is authorized by Schedule I of the NAFTA Rules of Origin Regulations, specifically, General Note 12(t)/85.147, HTSUS, which states:

(A) A change to subheadings 8544.11 through 8544.60 from any subheading outside that group, except from headings 7408, 7413, 7605 or 7614; or

(B) A change to subheadings 8544.11 through 8544.60 from headings 7408, 7413, 7605 or 7614, whether or not there is also a change from any other subheading, including another subheading within subheadings 8544.11 through 8544.60, provided there is also a regional value content of not less than:

(1) 60 percent where the transaction value method is used, or

(2) 50 percent where the net cost method is used.

The wire harnesses must meet the requirements of either General Note 12(t)/85.147(A), HTSUS, or General Note 12(t)/85.147(B), HTSUS, to qualify as an "originating good"; they do not have to meet both tests.

1. Insulated Wire Made in the U.S.A - "P/N 6 002 LGO 021 and 024"

In this situation, the non-originating materials are silicon rubber tube, plastic grommet, rubber o-ring seal, and connector terminal. All the remaining components are considered to be "originating goods." All of the non-originating components are not classified within subheadings 8544.11 through 8544.60, or headings 7408. 7413, 7605 or 7614. Thus, a change in tariff classification occurs. The wire harnesses manufactured from the non-originating silicon rubber tube, plastic grommet, rubber o-ring seal, and connector terminal meet the tariff shift requirements of General Note 12(t)/85.147(A), HTSUS, and, therefore, are considered to be "originating goods."

2. Insulated Wire Made in Germany - "P/N 6 002 LGO 020, 021, 023 and 024"

In this situation, the non-originating materials are insulated wire, silicon rubber tube, plastic grommet, rubber o-ring seal, and connector terminal. All the remaining components are considered to be "originating goods." All of these non-originating components, except the insulated wire, are not classified within subheadings 8544.11 through 8544.60, or headings 7408. 7413, 7605 or 7614. Thus, a change in tariff classification occurs. A change in tariff classification pursuant to General Note 12(t)/85.147(A), HTSUS, does not occur for the insulated wire because it is classified within subheading 8544.59.40, HTSUS.

However, □5 of the NAFTA Rules of Origin Regulations provides a de minimis rule for non-originating materials that do not undergo a required tariff change. □5 of the NAFTA Rules of Origin Regulations states that:

(1) Except as otherwise provided in subsection (4), a good shall be considered to originate in the territory of a NAFTA country where the value of the non-originating materials that are used in the production of the good and that do not undergo an applicable change in tariff classification as a result of production occurring entirely in the territory of one or more of the NAFTA countries is not more than seven percent

(a) of the transaction value of the good determined in accordance with Schedule II with respect to the transaction in which the producer of the good sold the good, adjusted to an F.O.B. basis, or

(b) of the total cost of the good, where there is no transaction value for the good under section 2(1) of Schedule III or the transaction value of the good is unacceptable under section 2(2) of that Schedule, provided that,

c) if, under the rule in which the applicable change in tariff classification is specified, the good is also subject to a regional value-content requirement, the value of those non-originating materials shall be taken into account in calculating the regional value content of the good in accordance with the method set out for that good, and

(d) the good satisfies all other applicable requirements of this Appendix. . .

□5 of the NAFTA Rules of Origin Regulations provide that the value of all non-originating materials which do not undergo a change in tariff classification must not be more than 7 percent of the transaction value of the good, adjusted to a F.O.B. basis; or, if there is no transaction value for the good under section 2(1) of Schedule III or the transaction value of the good is unacceptable under section 2(2) of that Schedule, the value of all such non-originating materials is not more than 7 percent of the total cost of the good. In this situation, the non-originating material which does not satisfy the tariff shift requirement is the insulated wire. Based on the information presented, it appears that the insulated wire which is imported into the NAFTA

territory from outside of the NAFTA territory constitutes more than 7 percent of the total cost of each wire harness. We note that you have supplied us with the total cost values without any indication of why the transaction value is unacceptable in accordance with Schedule II of the NAFTA Rules of Origin Regulations. Thus, □5 of the NAFTA Rules of Origin Regulations is inapplicable and the wire harnesses incorporating insulated wire from Germany are not considered "originating goods" pursuant to General Note 12(t)/85.147(A), HTSUS.

However, we are of the opinion that the wire harnesses do meet the tariff shift requirement of General Note 12(t)/85.147(B), HTSUS. The proper interpretation of the tariff shift requirement of General Note 12(t)/85.147(B), HTSUS, is that the non-originating materials must change to subheadings 8544.11 through 8544.60, from any other subheading within that group or headings 7408, 7413, 7605 or 7614, whether or not there is also a change from any other subheading, provided the regional value content requirement is met. See, Headquarters Ruling Letter (HRL) 957188 dated February 9, 1995. The imported insulated wire, which is classifiable under subheading 8544.59.40, HTSUS, meets the tariff shift requirement. Next, the wire harnesses must also meet the regional value content requirement, i.e., "(a) 60 percent where the transaction value method is used, or (b) 50 percent where the net cost method is used." □9(1) of the NAFTA Rules of Origin Regulations provides the following guidance regarding the regional value content of automotive goods:

For purposes of calculating the regional value content of a light-duty automotive good under the net cost method, the value of non-originating materials used by the producer in the production of the good shall be the sum of the values of the non-originating materials that are traced materials and are incorporated into the good.

Traced material is defined in □8 of the NAFTA Rules of Origin Regulations as:

a material, produced outside the territories of the NAFTA countries, that is imported from outside the territories of the NAFTA countries and is, when imported, of a tariff provision listed in Schedule IV.

Light-duty automotive good is defined in □2 of the NAFTA Rules of Origin Regulations as:

a light-duty vehicle or a good of a tariff provision listed in Schedule IV that is subject to a regional value-content requirement and is for use as original equipment in the production of a light-duty vehicle.

Light-duty vehicle is defined in □2 of the NAFTA Rules of Origin Regulations as:

a motor vehicle provided for in any of tariff items 8702.10.60 and 8702.10.60 (vehicles for the transport of 15 or fewer persons) and subheadings 8703.21 through 8703.90, 8704.21 and 8704.31.

Schedule IV (LIST OF TARIFF PROVISIONS FOR THE PURPOSES OF SECTION 9 OF THE APPENDIX) of the NAFTA Rules of Origin Regulations lists subheading 8544.30, HTSUS. Therefore, the wire harnesses met the definition of a light duty automotive good pursuant to □2 of the NAFTA Rules of Origin Regulations. To calculate the regional value content of the wire harnesses under the net cost method, we must calculate the value of the non-originating materials. Pursuant to □9(1) of the NAFTA Rules of Origin Regulations, the value of the non-originating materials is the sum of the values of the non-originating materials that are traced materials incorpo-

rated into the wire harnesses. In this situation the non-originating materials are the insulated wire, plastic grommet, rubber o-ring seal, rubber silicon tube and connector terminal. The insulated wire, plastic grommet and rubber o-ring seal are not listed in Schedule IV of the NAFTA Rules of Origin Regulations and, therefore, are not traced materials. However, the rubber silicon tube and connector terminal are listed as traced material in Schedule IV of the NAFTA Rules of Origin Regulations. Thus, the value of the insulated wire, plastic grommet and rubber o-ring seal are not included in the value of the non-originating materials when calculating the regional value content but they are included in the net cost of the wire harnesses. Whereas, the value of the rubber silicon tube and connector terminal is included in the value of the non-originating materials when calculating the regional value content.

Based on the cost information you submitted, the value of the non-originating materials is \$0.10. We assume that the value of the non-originating traced materials submitted in your cost information is made in accordance with the "Valuation of Traced Materials for VNM in the RVC" of $\square 9(2)$ of the NAFTA Rules of Origin Regulations. The regional value content is the net cost minus the value of the non-originating materials, which is the traced materials in this case, divided by the net cost times 100. Your cost information per unit for "P/N 002 LGO 021 and 024" indicates the following calculation:

$(\$2.64 - \$0.10) \times 100 = 96.21\%$ \$2.64 Your cost information per unit for "P/N 002 LGO 020 and 023" indicates the following calculation:

$(\$2.74 - \$0.10) \times 100 = 96.35\%$ \$2.74 Thus, the regional value content in the case of the German made insulated wire is 96%. The wire harnesses in this situation meet the requirements of General Note 12(t)/85.147(B), HTSUS, and are considered "originating goods" pursuant to General Note 12(b)(ii), HTSUS.

HOLDING:

Based on the presented facts, the wire harnesses are found to be "originating goods" in accordance with NAFTA, provided all other applicable requirements are met.

This holding applies only to the specific factual situation and merchandise identified in the ruling request. This position is clearly set forth in $\square 181.100(a)(2)$, Customs Regulations, which states that a NAFTA ruling letter is issued on the assumption that all the information furnished in connection with the ruling request and incorporated therein, directly, by reference, or by implication, is accurate and complete in every respect. Should it subsequently be determined that the information furnished is not complete and/or does not comply with 19 CFR $\square 181.100(a)(2)$, this ruling will be subject to modification or revocation. In addition, any change in the facts furnished in connection with this ruling may affect the outcome of the regional value content determination. In such a case, it is recommended that a new ruling request be submitted in accordance with 19 CFR $\square 181.93$.

Sincerely,
Acting Director,
International Trade Compliance Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 957188
February 9, 1995
CLA-2 CO:R:C:M 957188 KCC
CATEGORY: Classification
TARIFF NO.: 8544.30

ELIZABETH J. VANN, ESQ.
KEMP, SMITH, DUNCAN & HAMMOND, P.C.
P.O. Box 2800
El Paso, Texas 79901-1441

RE: Wire Harnesses; automotive good; Article 509; NAFTA; copper rod; 7407.10.50; insulated copper wire; 8544.40.00; non-insulated copper wire; 7408; plastic seals; 4016.93.00; General Note 12(b)(ii); originating good; non-originating good; tariff shift requirement; General Note 12(t)/85.147 (A) and (B); General Note 12(f); de minimis; 7 percent; Section 2, 5 and 9(1) of the NAFTA Rules of Origin Regulation; traced material; light-duty automotive good; light-duty vehicle; Schedule IV of NAFTA Rules of Origin Regulation; non-originating material's value

DEAR MS. VANN:

This is in response to your letter dated October 20, 1994, on behalf of United Technologies Automotive, Inc. (UTA), concerning the applicability of the North American Free Trade Agreement (NAFTA) to wire harnesses when imported into the United States.

FACTS:

UTA's Mexican subsidiary will be manufacturing wire harnesses, which are to be imported into the U.S., for use as original equipment in the production of a good provided for under subheading 8702.10.60 or 8702.90.60, HTSUS, or subheadings 8703.21 through 8703.90, 8704.21 or 8704.31, HTSUS. UTA manufactures hundreds of different models of wire harnesses in which the exact types and numbers of components can vary from model to model. You state that the following six fact situations represent the situations encountered by UTA in its manufacturing operations:

1. Copper rod classifiable under subheading 7407.10.50, HTSUS, is imported into the NAFTA territory from outside the NAFTA territory, and processed in the NAFTA territory into insulated copper wire classifiable under subheading 8544.49.00, HTSUS. The insulated copper wire is then purchased by UTA and manufactured in Mexico into wire harnesses. The wire harnesses will then be imported into the U.S. by UTA under subheading 8544.30.00, HTSUS.

We are asked to assume that the copper rod imported into the NAFTA territory is not an "originating good." Additionally, we are asked to assume that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods".

2. Insulated copper wire classifiable under subheading 8544.49.00, HTSUS, is imported into the NAFTA territory from outside the NAFTA territory. The insulated copper wire is then purchased by UTA and manufac-

tured in Mexico into wire harnesses. The wire harnesses will then be imported into the U.S. by UTA under subheading 8544.30.00, HTSUS.

We are asked to assume that the insulated copper wire, imported into the NAFTA territory is not an "originating good." Additionally, we are asked to assume that all other components of the wire harnesses, except for certain plastic seals classifiable under subheading 4016.93.00, HTSUS, meet the tariff shift requirements and/or are "originating goods".

We are also asked to assume that the value of the insulated copper wire which is imported into the NAFTA territory constitutes 7% of the total cost of each wire harness and that the value of the non-originating plastic seals which are incorporated into the wire harness constitutes 2% of the total cost of the wire harness, where there is no transaction value for the good under section 2(1) of Schedule III or the transaction value of the good is unacceptable under section 2(2) of Schedule III.

3. Insulated copper wire classifiable under subheading 8544.49.00, HTSUS, is imported into the NAFTA territory from outside the NAFTA territory. The insulated copper wire is then purchased by UTA and manufactured in Mexico into wire harnesses. The wire harnesses will then be imported into the U.S. by UTA under subheading 8544.30.00, HTSUS.

We are asked to assume that the insulated copper wire, imported into the NAFTA territory is not an "originating good." Additionally, we are asked to assume that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods".

We are also asked to assume that the value of the non-originating wire insulated copper wire exceeds the de minimis amount found in General Note 12(f), HTSUS.

4. Insulated copper wire classifiable under subheading 8544.49.00, HTSUS, is imported into the NAFTA territory from outside the NAFTA territory. Non-insulated copper wire classifiable under heading 7408, HTSUS, is imported into the NAFTA territory from outside of the NAFTA territory. The non-insulated copper wire is insulated in the NAFTA territory to form insulated copper wire classifiable under subheading 8544.49.00, HTSUS. The imported insulated copper wire and the NAFTA manufactured insulated copper wire are then purchased by UTA and manufactured in Mexico into wire harnesses. The wire harnesses which include both imported insulated copper wire and NAFTA manufactured insulated copper wire, will then be imported into the U.S. by UTA under subheading 8544.30.00, HTSUS.

We are asked to assume that the insulated copper wire and the non-insulated copper wire, imported into the NAFTA territory are not "originating goods." Additionally, we are asked to assume that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods".

We are also asked to assume that the value of the non-originating insulated copper wire and the non-insulated copper wire exceeds the de minimis amount found in General Note 12(f), HTSUS.

5. Insulated copper wire classifiable under subheading 8544.49.00, HTSUS, is imported into the NAFTA territory from outside the NAFTA territory. Copper rod classifiable under subheading 7407.10.50, HTSUS, is imported into the NAFTA territory from outside of the NAFTA territory. The copper rod is extruded in the NAFTA territory to form copper wire and then insulated to form insulated copper wire classifiable under subheading 8544.49.00, HTSUS. The imported insulated copper wire and the NAFTA

manufactured insulated copper wire are then purchased by UTA and manufactured in Mexico into wire harnesses. The wire harnesses which include both imported insulated copper wire and NAFTA manufactured insulated copper wire, will then be imported into the U.S. by UTA under subheading 8544.30.00, HTSUS.

We are asked to assume that the insulated copper wire and the copper rod, imported into the NAFTA territory are not "originating goods." Additionally, we are asked to assume that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods".

We are also asked to assume that the value of the non-originating insulated copper wire exceeds the de minimis amount found in General Note 12(f), HTSUS.

6. Insulated copper wire classifiable under subheading 8544.49.00, HTSUS, is imported into the NAFTA territory from outside the NAFTA territory. Non-insulated copper wire classifiable under heading 7408, HTSUS, is manufactured in the NAFTA territory from NAFTA origin ore and/or NAFTA origin copper rod. The imported insulated copper wire and the NAFTA manufactured non-insulated copper wire are then purchased by UTA and manufactured in Mexico into wire harnesses. The wire harnesses which include both imported insulated copper wire and NAFTA manufactured non-insulated copper wire, will then be imported into the U.S. by UTA under subheading 8544.30.00, HTSUS.

We are asked to assume that the insulated copper wire imported into the NAFTA territory is are not an "originating good." Additionally, we are asked to assume that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods".

We are also asked to assume that the value of the non-originating insulated copper wire exceeds the de minimis amount found in General Note 12(f), HTSUS.

With regards to the above fact situations, we are asked to disregard the regional value content requirement. You state that UTA is not requesting guidance regarding the calculation of regional value content. UTA is fully aware that it must comply with any applicable regional value content requirements. The above fact situations are representative situations which illustrate the NAFTA legal issues on which UTA needs guidance. UTA is specifically concerned with the application of the NAFTA tariff shift rules and the application of the de minimis rules to the wire harnesses.

ISSUE:

Are the wire harnesses considered to be "originating goods" pursuant to the rules of origin in General Note 12(b)(ii), HTSUS?

LAW AND ANALYSIS:

To be eligible for tariff preferences under the NAFTA, goods must be "originating goods" within the rules of origin in General Note 12(b), HTSUS. In this case, the method by which the wire harnesses imported into the United States may be "goods originating in the territory of a NAFTA party" is General Note 12(b)(ii), HTSUS. General Note 12(b)(ii), HTSUS, states that to be "goods originating in the territory of a NAFTA party":

(ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that--

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivision (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivision (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note. . . .

In the above-described fact situations, we must examine whether the wire harnesses are "transformed in the territory of Canada, Mexico and/or the United States" pursuant to General Note 12(b)(ii)(A), HTSUS. As the wire harnesses are classified under subheading 8544.30.00, HTSUS, a transformation is authorized by General Note 12(t)/85.147, HTSUS, which states:

(A) A change to subheadings 8544.11 through 8544.60 from any subheading outside that group, except from headings 7408, 7413, 7605 or 7614; or

(B) A change to subheadings 8544.11 through 8544.60 from headings 7408, 7413, 7605 or 7614, whether or not there is also a change from any other subheading, including another subheading within subheadings 8544.11 through 8544.60, provided there is also a regional value content of not less than:

(1) 60 percent where the transaction value method is used, or

(2) 50 percent where the net cost method is used.

The wire harnesses must meet the requirements of either General Note 12(t)/85.147(A), HTSUS, or General Note 12(t)/85.147(B), HTSUS, to qualify as an "originating good"; they do not have to meet both tests.

Fact Situation #1

In this situation, the non-originating material, i.e., copper rod, is classifiable under subheading 7407.10.50, HTSUS. Additionally, we are asked to assume that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods". Since the copper rod is not classified within subheadings 8544.11 through 8544.60, or headings 7408, 7413, 7605 or 7614, a change in tariff classification occurs. The wire harnesses manufactured from non-originating copper rod meet the tariff shift requirements of General Note 12(t)/85.147(A), HTSUS, and, therefore, are considered to be "originating goods" pursuant to General Note 12(b)(ii), HTSUS.

Fact Situation #2

In this situation, the non-originating material, i.e., insulated copper wire and plastic seals, are classifiable under subheading 8544.49.00, and 4016.93.00, HTSUS, respectively. Additionally, we are asked to assume that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods". Since the plastic seals are not classified within subheading 8544.11 through 8544.60, or headings 7408, 7413, 7605 or 7614, a change in tariff classification occurs for the plastic seals. A change in tariff classification does not occur for the insulated copper wire because it is classified within subheading 8544.49, HTSUS.

However, General Note 12(f), HTSUS, provides a de minimis rule for non-originating materials that do not undergo a required tariff change. General Note 12(f), HTSUS, states:

(i) . . . a good shall be considered to be an originating good if the value of all non-originating materials used in the production of the good that do not undergo an applicable change in tariff classification set out in subdivision (t) of this note is not more than 7 percent of the transaction value of the good,

adjusted to a F.O.B. basis, or, if the transaction value is unacceptable under section 402(b) of the Tariff Act of 1930, as amended, the value of all such non-originating materials is not more than 7 percent of the total cost of the good, provided that--

(A) if the good is subject to a regional value-content requirement, the value of such non-originating materials shall be taken into account in calculating the regional value content of the good; and

(B) the good satisfies all other applicable requirements of this note.

Section 5 of the NAFTA Rules of Origin Regulations, Appendix to Part 181, Customs Regulations (19 CFR Appendix to Part 181), further describes the de minimis rule:

(1) Except as otherwise provided in subsection (4), a good shall be considered to originate in the territory of a NAFTA country where the value of the non-originating materials that are used in the production of the good and that do not undergo an applicable change in tariff classification as a result of production occurring entirely in the territory of one or more of the NAFTA countries is not more than seven percent

(a) of the transaction value of the good determined in accordance with Schedule II with respect to the transaction in which the producer of the good sold the good, adjusted to an F.O.B. basis, or

(b) of the total cost of the good, where there is no transaction value for the good under section 2(1) of Schedule III or the transaction value of the good is unacceptable under section 2(2) of that Schedule, provided that,

c) if, under the rule in which the applicable change in tariff classification is specified, the good is also subject to a regional value-content requirement, the value of those non-originating materials shall be taken into account in calculating the regional value content of the good in accordance with the method set out for that good, and

(d) the good satisfies all other applicable requirements of this Appendix. . .

In this situation, the non-originating material which does not satisfy the tariff shift requirement is the insulated copper wire. You asked us to assume that the insulated copper wire which is imported into the NAFTA territory from outside of the NAFTA territory constitutes 7 percent of the total cost of each wire harness and that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods". Assuming these facts, the value of all the non-originating materials that do not undergo an applicable change in tariff classification is not more than 7 percent of the total cost of the wire harness.

General Note 12(f), HTSUS, states that the value of all non-originating materials which do not undergo a change in tariff classification must not be more than 7 percent of the transaction value of the good, adjusted to a F.O.B. basis, or, if the transaction value is unacceptable under section 402(b) of the Tariff Act of 1930, as amended, the value of all such non-originating materials is not more than 7 percent of the total cost of the good. . . . We note that you have supplied us with total cost values without any indication of why the transaction value is unacceptable. Therefore, we are additionally asked to assume that the transaction value is unacceptable under section 402(b) of the Tariff Act of 1930, as amended. We proceed under this assumption without regard to whether the actual facts require otherwise.

We are of the opinion that the wire harnesses in this situation are "originating goods." The plastic seals meet the tariff shift requirement of General

Note 12(t)/85.147(A), HTSUS, and are considered to be "originating goods." Therefore, the value of the plastic seals is not taken into account when calculating the de minimis exception. The insulated copper wire does not meet the tariff shift requirement, but it is valued at 7 percent of the total cost of each wire harness. The value of all the non-originating materials used in producing the wire harnesses which do not undergo the change in tariff classification is not more than 7 percent of the total cost of the wire harnesses. Therefore, pursuant to the de minimis exception, the insulated copper wire is ignored and the wire harnesses meet the tariff shift requirements of General Note 12(t)/85.147(A), HTSUS, and, therefore are considered "originating goods" pursuant to General Note 12(b)(ii), HTSUS.

Fact Situation #3

In this situation, insulated copper wire imported in the NAFTA territory is valued over 7 percent and is classifiable under subheading 8544.49.00, HTSUS. We are asked to assume that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods". Since the insulated copper wire is classified within subheadings 8544.11 through 8544.60, a change in tariff classification does not occur pursuant to General Note 12(t)/85.147(A), HTSUS.

We are of the opinion that the wire harnesses do meet the tariff shift requirement of General Note 12(t)/85.147(B), HTSUS.

The proper interpretation of the tariff shift requirement of General Note 12(t)/85.147(B), HTSUS, is that the non-originating materials must change to subheadings 8544.11 through 8544.60, from any other subheading within that group or headings 7408, 7413, 7605 or 7614, whether or not there is also a change from any other subheading, provided the regional value content requirement is met. The imported insulated copper wire, which is classifiable under subheading 8544.49.00, HTSUS, meets the tariff shift requirement.

However, the wire harnesses must also meet the regional value content requirement, i.e., "(a) 60 percent where the transaction value method is used, or (b) 50 percent where the net cost method is used."

General Note 12(d), HTSUS, sets forth the following special rule for calculating the regional value content of automotive goods:

(i) For purposes of calculating the regional value content under the net cost method set out in subdivision (c)(ii) of this note for--

(A) a good that is a motor vehicle provided for in tariff item 8702.10.60 or 8702.90.60, or subheadings 8703.21 through 8703.90, inclusive, 8704.21 or 8704.31; or

(B) a good provided for in the tariff items listed in Annex 403.1 where the good is subject to a regional value-content requirement and is for use as original equipment in the production of a good provided for in tariff items 8702.10.60 or 8702.90.60, or subheadings 8703.21 through 8703.90, inclusive, 8704.21 or 8704.31, the value of non-originating materials used by the producer in the production of the good shall be the sum of the values of non-originating materials, determined in accordance with subdivision (c)(vii) of this note at the time the non-originating materials are received by the first person in the territory of Canada, Mexico or the United States who takes title to them; that are imported from outside the territories of Canada, Mexico and the United States under the tariff items listed in Annex 403.1 to the NAFTA and that are used in the production of the good or that are used in the production of any material used in the production of the good.

Section 9(1) of the NAFTA Rules of Origin Regulations provides the following guidance regarding the regional value content of automotive goods:

For purposes of calculating the regional value content of a light-duty automotive good under the net cost method, the value of non-originating materials used by the producer in the production of the good shall be the sum of the values of the non-originating materials that are traced materials and are incorporated into the good.

Traced material is defined in Section 8 of the NAFTA Rules of Origin Regulations as:

a material, produced outside the territories of the NAFTA countries, that is imported from outside the territories of the NAFTA countries and is, when imported, of a tariff provision listed in Schedule IV.

Light-duty automotive good is defined in Section 2 of the NAFTA Rules of Origin Regulations as:

a light-duty vehicle or a good of a tariff provision listed in Schedule IV that is subject to a regional value-content requirement and is for use as original equipment in the production of a light-duty vehicle.

Light-duty vehicle is defined in Section 2 of the NAFTA Rules of Origin Regulations as:

a motor vehicle provided for in any of tariff items 8702.10.60 and 8702.10.60 (vehicles for the transport of 15 or fewer persons) and subheadings 8703.21 through 8703.90, 8704.21 and 8704.31.

Schedule IV (LIST OF TARIFF PROVISIONS FOR THE PURPOSES OF SECTION 9 OF THE APPENDIX) of the NAFTA Rules of Origin Regulations lists subheading 8544.30, HTSUS. Therefore, the wire harnesses meet the definition of a light duty automotive good pursuant to Section 2 of the NAFTA Rules of Origin Regulations. To calculate the regional value content of the wire harnesses under the net cost method, we must calculate the value of the non-originating materials. Pursuant to section 9(1) of the NAFTA Rules of Origin Regulations, the value of the non-originating materials is the sum of the values of the non-originating materials that are traced materials incorporated into the wire harnesses. In this situation the non-originating material is the insulated copper wire. We note that under the facts there may also be other non-originating materials. We will assume that these non-originating materials are not "traced materials." The insulated copper wire is not listed in schedule IV of the NAFTA Rules of Origin Regulations and, therefore, is not a traced material. Thus, the value of the insulated copper wire is not included in the value of the non-originating goods when calculating the regional value content but it is included in the net cost of the wire harnesses.

In this situation, the value of the non-originating materials is 0 and, therefore, the regional value content is 100%. The wire harnesses in this situation meet the requirements of General Note 12(t)/85.147(B), HTSUS, and are considered "originating goods" pursuant to General Note 12(b)(ii), HTSUS.

Fact Situation #4

In this situation, insulated copper wire imported in the NAFTA territory is valued over 7 percent and is classifiable under subheading 8544.49.00, HTSUS. Non-insulated copper wire imported into the NAFTA territory is valued over 7 percent and is classifiable under heading 7408, HTSUS. We are asked to assume that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods". Since the insu-

lated copper wire and non-insulated copper wire are classified within subheadings 8544.11 through 8544.60 and heading 7408, a change in tariff classification does not occur pursuant to General Note 12(t)/85.147(A), HTSUS.

We are of the opinion that the wire harnesses do meet the tariff shift requirement of General Note 12 (t)/85.147(B), HTSUS. As stated previously, the proper interpretation of the tariff shift requirement of General Note 12(t)/85.147(B), HTSUS, is that the non-originating materials must change to subheadings 8544.11 through 8544.60 from any other subheading within that group or headings 7408, 7413, 7605 or 7614, whether or not there is also a change from any other subheading, provided the regional value content requirement is met. The insulated copper wire which is classified under subheading 8544.49.00, HTSUS, meets the tariff shift requirement and the imported non-insulated copper wire, which is classifiable under heading 7408, HTSUS, also meets the tariff shift requirement. The tariff shift requirement of General Note 12(t)/85.147(B), HTSUS, has been met.

However, the wire harnesses must also meet the regional value content requirement, i.e., "(a) 60 percent where the transaction value method is used, or (b) 50 percent where the net cost method is used."

Schedule IV (LIST OF TARIFF PROVISIONS FOR THE PURPOSES OF SECTION 9 OF THE APPENDIX) of the NAFTA Rules of Origin Regulations lists subheading 8544.30, HTSUS. Therefore, the wire harnesses met the definition of a light duty automotive good pursuant to Section 2 of the NAFTA Rules of Origin Regulations. To calculate the regional value content of the wire harnesses under the net cost method, we must calculate the value of the non-originating materials. Pursuant to section 9(1) of the NAFTA Rules of Origin Regulations, the value of the non-originating materials is the sum of the values of the non-originating materials that are traced materials incorporated into the wire harnesses. In this situation the non-originating materials are the insulated copper wire and the non-insulated copper wire. We note that under the facts there may also be other non-originating materials. We will assume that these non-originating materials are not "traced materials." The insulated copper wire and non-insulated copper wire are not listed in schedule IV of the NAFTA Rules of Origin Regulations and, therefore, are not traced materials. Thus, the value of the insulated copper wire and the non-insulated copper wire are not included in the value of the non-originating goods when calculating the regional value content but they are included in the net cost of the wire harnesses.

In this situation, the value of the non-originating materials is 0 and, therefore, the regional value content is 100%. The wire harnesses in this situation meet the requirements of General Note 12(t)/85.147(B), HTSUS, and are considered "originating goods" pursuant to General Note 12(b)(ii), HTSUS.

Fact Situation #5

We note that General Note 12 (b) (ii) (A), HTSUS, states for a good to be considered an originating good "each of the non-originating materials used in the production of such goods undergoes a change in tariff classification . . . (emphasis added)." In this situation the non-originating materials are the imported insulated copper wire and the imported copper rod. Each of these non-originating components imported into the NAFTA territory must meet the tariff shift requirement of either General Note 12(t)/85.147(A) or 85.147(B), HTSUS. The imported copper rod, which is classifiable under

subheading 7407.10.50, HTSUS, meets the tariff shift requirement of (A) because it is classifiable outside of subheadings 8544.11 through 8544.60 or headings 7408, 7413, 7605 or 7614. As stated previously, the imported insulated copper wire does not meet this tariff shift requirement because it is classifiable under subheading 8544.49.00, HTSUS. The wire harnesses in this situation do not meet the tariff shift requirement of General Note 12 (t)/85.147 (A), HTSUS.

We are of the opinion that the wire harnesses do meet the tariff shift requirement of General Note 12(t)/85.147(B), HTSUS. As stated previously, the proper interpretation of the tariff shift requirement of General Note 12(t)/85.147(B), HTSUS, is that the non-originating materials must change to subheadings 8544.11 through 8544.60 from any other subheading within that group or headings 7408, 7413, 7605 or 7614, whether or not there is also a change from any other subheading, provided the regional value content requirement is met. The insulated copper wire which is classified under subheading 8544.49.00, HTSUS, meets the tariff shift requirement and the copper rod, which is classifiable under heading 7407.10.50, HTSUS, also meets the tariff shift requirement. The tariff shift requirement of General Note 12(t)/85.147 (B), HTSUS, has been met.

However, the wire harnesses must also meet the regional value content requirement, i.e., "(a) 60 percent where the transaction value method is used, or (b) 50 percent where the net cost method is used."

Schedule IV (LIST OF TARIFF PROVISIONS FOR THE PURPOSES OF SECTION 9 OF THE APPENDIX) of the NAFTA Rules of Origin Regulations lists subheading 8544.30, HTSUS. Therefore, the wire harnesses meet the definition of a light duty automotive good pursuant to Section 2 of the NAFTA Rules of Origin Regulations. To calculate the regional value content of the wire harnesses under the net cost method, we must calculate the value of the non-originating materials. Pursuant to section 9(1) of the NAFTA Rules of Origin Regulations, the value of the non-originating materials is the sum of the values of the non-originating materials that are traced materials incorporated into the wire harnesses. In this situation the non-originating materials are the insulated copper wire and the copper rod. We note that under the facts there may also be other non-originating materials. We will assume that these non-originating materials are not "traced materials." The insulated copper wire and copper rod are not listed in schedule IV of the NAFTA Rules of Origin Regulations and, therefore, are not traced materials. Thus, the value of the insulated copper wire and the copper rod are not included in the value of the non-originating goods when calculating the regional value content but they are included in the net cost of the wire harnesses.

In this situation, the value of the non-originating materials is 0 and, therefore, the regional value content is 100%. The wire harnesses in this situation meet the requirements of General Note 12(t)/85.147(B), HTSUS, and are considered "originating goods pursuant to General Note 12(b)(ii), HTSUS.

Fact Situation #6

The same legal principles applied in Fact Situation #5, apply to the wire harnesses in this situation. In this case, the facts call for NAFTA origin ore or NAFTA origin copper rod which is processed into copper wire which is processed into insulated copper wire which is manufactured into the wire harnesses. Since the ore or copper rod are "originating goods", they are not

factored into the tariff shift requirements. As stated previously, General Note 12(b) (ii) (A), HTSUS, states that "each of the non-originating materials used in the production of such goods undergoes a change in tariff classification . . . (emphasis added)." The only non-originating good is the imported insulated copper wire which we have consistently stated does not meet the tariff shift requirements of General Note 12(t)/85.147(A), HTSUS. However, as stated in Fact Situation #3, the wire harnesses manufactured from non-originating copper wire do meet the requirements of General Note 12(t)/ 85.147(B), HTSUS. Therefore, the wire harnesses, in this case, are considered "originating goods" pursuant to General Note 12(b)(ii), HTSUS.

HOLDING:

Based on the presented facts and the "originating" and value assumptions set forth above, the wire harnesses in each Fact Situation are found to be "originating goods" pursuant to the rules of origin in General Note 12(b), HTSUS, provided all other applicable requirements are met.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 968072
CLA-2 RR:CTF:TCM 968072 HkP
CATEGORY: Classification
TARIFF NO.: 8544.30.00

MR. DONALD PFEIFFER
PRETTL ELECTRIC CORPORATION
1721 White Horse Road
Greenville, South Carolina 29605

RE: Wire Harnesses; insulated wire from Germany; NAFTA; modification of HQ 546674

DEAR MR. PFEIFFER:

This is in reference to Headquarters Ruling Letter (HQ) 546674, dated April 16, 1998, regarding the applicability of the North American Free Trade Agreement ("NAFTA") to certain wire harnesses. We have reconsidered HQ 546674 and have determined that portions of the tariff shift analysis conducted were not correct.

FACTS:

In HQ 546674, the U.S. Customs Service, now U.S. Customs and Border Protection ("CBP"), was asked to consider the applicability of the NAFTA in certain situations to wire harnesses produced in Mexico of various originating and non-originating materials and exported to the United States. The harnesses were classified under subheading 8544.30.00, Harmonized Tariff

Schedule of the United States ("HTSUS"), which provides for "Insulated . . . wire, cable . . . and other insulated electric conductors, whether or not fitted with connectors: . . . Ignition wiring sets and other wiring sets of a kind used in vehicles, aircraft or ships", and were held to be "originating goods" of Mexico, subject to preferential treatment under the NAFTA.

In one of the situations presented for our consideration, all of the non-originating materials (silicon rubber tubes plastic grommets, rubber o-ring seals and connector terminals) for the wire harnesses, except for insulated wire from Germany, were classified outside of subheadings 8544.11 through 8544.60, or headings 7408, 7423, 7605, or 7614, HTSUS. CBP ruled that a change in the tariff classification of the silicon rubber tubes, plastic grommets, rubber o-ring seals, and connector terminals occurred pursuant to General Note ("GN") 12(t)/85.147(A), HTSUS. With regard to the non-originating insulated wire from Germany, CBP ruled that the tariff shift requirement of GN 12(t)/85.147(B), HTSUS, had been met because "[t]he proper interpretation of the tariff shift requirement of General Note 12(t)/85.147(B), HTSUS, is that the non-originating materials must change to subheadings 8544.11 through 8544.60, from any other subheading within that group or headings 7408, 7413, 7605, or 7614, whether or not there is a change from any other subheading, provided the regional value content requirement is met." Upon review, CBP has determined that the tariff shift analysis performed pursuant to GN 12(t)/85.147(B), HTSUS, with respect to insulated wire from Germany, was erroneous. This ruling letter sets forth the correct analysis.

ISSUE:

Are the wire harnesses considered to be "originating goods" pursuant to the rules of origin in General Note 12(b)(ii), HTSUS?

LAW AND ANALYSIS:

General Note 12 of the HTSUS incorporates Article 401, North American Free Trade Agreement, as implemented by section 207 of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (December 8, 1993) and the interim amendments to the CBP Regulations, published as T.D. 94-4 (59 Fed. Reg. 109, January 3, 1994), into the HTSUS. Note 12(b) provides in relevant part:

For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as "goods originating in the territory of a NAFTA party" only if -

ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that--

A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivision (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivision (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note[.]

Originating goods status is conferred on wire harnesses classified under subheading 8544.30.00, HTSUS, by GN 12(t)/85.147, HTSUS, which allows:

- (A) A change to subheadings 8544.11 through 8544.60 from any subheading outside that group, except from headings 7408, 7413, 7605 or 7614; or
- (B) A change to subheadings 8544.11 through 8544.60 from headings 7408, 7413, 7605 or 7614, whether or not there is also a change from any other subheading, including another subheading within subheadings 8544.11 through 8544.60, provided there is also a regional value content of not less than:
 - (1) 60 percent where the transaction value method is used, or
 - (2) 50 percent where the net cost method is used.

We note that goods must meet the requirements of either GN 12(t)/85.147(A) or (B), HTSUS, in order to be treated as an "originating good"; they do not have to meet both rules.

In your Advance Ruling Request of February 19, 1997, you state that, "when the component wire is non-originating and the Tariff Change rule can not [sic] be met . . . we can make use of the Regional Value Content."

We disagree. It is our opinion that the rule to be met, GN 12(t)/85.147(B), HTSUS, requires that in order for a transformation/tariff shift to occur there **must** be a change in the tariff classification of a good to subheadings 8544.11 through 8544.60 from headings 7408, 7413, 7605 or 7614, HTSUS, **and** the good must also have a regional value content of not less than 60% where the transaction value method is used, or 50% where the net cost method is used. A change to subheadings 8544.11 through 8544.60, HTSUS, from any other subheading, including another subheading within subheadings 8544.11 through 8544.60, HTSUS, may also occur but the good only qualifies where the previously described tariff shift occurs and the regional content test is met.

Applying the requirements of GN 12(t)/85.147(B), HTSUS, to the insulated wire from Germany, classified in subheading 8544.59.40, HTSUS, we are of the opinion that the change in tariff classification that occurs would not fulfill the requirements for conferring origin because the imported wire was not classified within headings 7408, 7413, 7605, or 7614, HTSUS. Since the required tariff shift for the German wire does not take place, we do not consider the wire harnesses to have originated in a NAFTA territory under the provisions of GN 12(t)/85.147(B), HTSUS, even though regional value content requirements may be met.

Next, we consider whether, despite not meeting the requirements of GN 12(t)/85.147(B), HTSUS, the wire harnesses may be considered to be originating goods under the *de minimis* exception to GN 12(b)(ii)(A), HTSUS.

General Note 12(f)(i), HTSUS, provides:

Except as provided in subdivisions (f)(iii) through (vi), inclusive, a good shall be considered to be an originating good if the value of all non-originating materials used in the production of the good that do not undergo an applicable change in tariff classification set out in subdivision (t) of this note is not more than 7 percent of the transaction value of the good, adjusted to a F.O.B. basis, or, if the transaction value is unacceptable under section 402(b) of the Tariff Act of 1930, as amended, the

value of all such non-originating materials is not more than 7 percent of the total cost of the good, provided that —

- (A) if the good is subject to a regional value-content requirement, the value of such non-originating materials shall be taken into account in calculating the regional value content of the good; and
- (B) the good satisfies all other applicable requirements of this note.

Section 5 of the NAFTA Rules of Origin Regulations, Appendix to Part 181, Customs Regulations (19 CFR Appendix to Part 181), further describes the *de minimis* rule:

(1) Except as otherwise provided in subsection (4), a good shall be considered to originate in the territory of a NAFTA country where the value of the non-originating materials that are used in the production of the good and that do not undergo an applicable change in tariff classification as a result of production occurring entirely in the territory of one or more of the NAFTA countries is not more than seven percent

(a) of the transaction value of the good determined in accordance with Schedule II with respect to the transaction in which the producer of the good sold the good, adjusted to an F.O.B. basis, or

(b) of the total cost of the good, where there is no transaction value for the good under section 2(1) of Schedule III or the transaction value of the good is unacceptable under section 2(2) of that Schedule,

provided that,

c) if, under the rule in which the applicable change in tariff classification is specified, the good is also subject to a regional value-content requirement, the value of those non-originating materials shall be taken into account in calculating the regional value content of the good in accordance with the method set out for that good, and

(d) the good satisfies all other applicable requirements of this appendix.

You provided us with two different costs for the wire from Germany. In Material Description/Evaluation P/N 6 002 LGO 021 and 024, you stated that the total cost of the wire from Germany was \$0.33 and that the total cost for the wire harnesses was \$1.23 each. In Material Description/Evaluation P/N 6 002 LGO 020 and 023, you stated that the total cost of the wire from Germany was \$0.20 and that the total cost of the wire harnesses was \$1.06 each. In each of these situations, the German wire constitutes more than 7% of the total cost of each wire harness ($\$0.33/\$1.23 \times 100 = 26.89\%$; $\$0.20/\$1.06 \times 100 = 18.86\%$). Consequently, the harnesses would be ineligible for the *de minimis* allowance of GN 12(f), HTSUS, and Section 5(1) of the NAFTA Rules of Origin Regulations and would not be considered to be originating goods under the NAFTA.

HOLDING:

By application of GN 12(t)/85.147 and GN 12(f), HTSUS, the non-originating insulated wire is not transformed pursuant to the requirements of GN 12(b)(ii)(A), HTSUS. The wire harnesses, therefore, are ineligible for the preferential tariff treatment accorded to goods originating in the territory of a NAFTA party, in this case Mexico.

EFFECT ON OTHER RULINGS:

HQ 546674, dated April 16, 1998, is modified with respect to the tariff shift analysis performed pursuant to GN 12(t)/85.147(B), HTSUS, concerning insulated wire from Germany. The tariff shift analysis performed pursuant to GN 12(t)/85.147(A), with respect to the other items described in HQ 546674, is unchanged.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 968074
CLA-2 RR:CTF:TCM 968074 HkP
CATEGORY: Classification
TARIFF NO.: 8544.30.00

ELIZABETH J. VANN, ESQ.
KEMP, SMITH, DUNCAN & HAMMOND, P.C.
P.O. Box 2800
El Paso, Texas 79901-1441

RE: Wire Harnesses; insulated copper wire; plastic seals; copper rod;
NAFTA; modification of HQ 957188

DEAR MS. VANN:

This is in reference to Headquarters Ruling Letter (HQ) 957188, dated February 9, 1995, regarding the classification of wire harnesses, copper rod, insulated copper wire, and plastic seals under the Harmonized Tariff Schedule of the United States ("HTSUS"). We have reconsidered HQ 957188 and have determined that the tariff shift analysis conducted in several of the "fact situations" is not correct.

FACTS:

In HQ 957188, the U.S. Customs Service, now U.S. Customs and Border Protection ("CBP") was asked by United Technologies Automotive, Inc. ("UTA") to consider the applicability of the North American Free Trade Agreement ("NAFTA") in certain situations (set forth below) to wire harnesses produced in Mexico of various originating and non-originating materials and exported to the United States. The harnesses were classified under subheading 8544.30.00, HTSUS, which provides for "Insulated . . . wire, cable . . . and other insulated electric conductors, whether or not fitted with connectors: . . . : Ignition wiring sets and other wiring sets of a kind used in vehicles, aircraft or ships."

In several of the situations presented for our consideration, CBP based its conclusions on an erroneous interpretation of tariff shift requirements under General Note 12(t)/85.147(B), stating that, "[t]he proper interpretation of

the tariff shift requirement of General Note 12(t)/85.147(B), HTSUS, is that the non-originating materials must change to subheadings 8544.11 through 8544.60, from any other subheading within that group or headings 7408, 7413, 7605, or 7614, whether or not there is a change from any other subheading, provided the regional value content requirement is met. "This ruling letter sets forth the correct analysis.

The affected Fact Situations are as follows:

Fact Situation 2

Insulated copper wire classifiable under subheading 8544.49.00, HTSUS, is imported into the NAFTA territory from outside the NAFTA territory. The insulated copper wire is then purchased by UTA and manufactured in Mexico into wire harnesses. The wire harnesses will then be imported into the U.S. by UTA under subheading 8544.30.00, HTSUS.

CBP was asked to assume that the insulated copper wire, imported into the NAFTA territory is not an "originating good." Additionally, we were asked to assume that all other components of the wire harnesses, except for certain plastic seals classifiable under subheading 4016.93.00, HTSUS, meet the tariff shift requirements and/or are "originating goods".

We were also asked to assume that the value of the insulated copper wire which is imported into the NAFTA territory constitutes 7% of the total cost of each wire harness and that the value of the non-originating plastic seals which are incorporated into the wire harness constitutes 2% of the total cost of the wire harness, where there is no transaction value for the good under section 2(1) of Schedule III or the transaction value of the good is unacceptable under section 2(2) of Schedule III.

Fact Situation 3

Insulated copper wire classifiable under subheading 8544.49.00, HTSUS, is imported into the NAFTA territory from outside the NAFTA territory. The insulated copper wire is then purchased by UTA and manufactured in Mexico into wire harnesses. The wire harnesses will then be imported into the U.S. by UTA under subheading 8544.30.00, HTSUS.

CBP was asked to assume that the insulated copper wire, imported into the NAFTA territory is not an "originating good." Additionally, we were asked to assume that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods".

We were also asked to assume that the value of the non-originating wire insulated copper wire exceeds the *de minimis* amount found in General Note 12(f), HTSUS.

Fact Situation 4

Insulated copper wire classifiable under subheading 8544.49.00, HTSUS, is imported into the NAFTA territory from outside the NAFTA territory. Non-insulated copper wire classifiable under heading 7408, HTSUS, is imported into the NAFTA territory from outside of the NAFTA territory. The non-insulated copper wire is insulated in the NAFTA territory to form insulated copper wire classifiable under subheading 8544.49.00, HTSUS. The imported insulated copper wire and the NAFTA-manufactured insulated copper wire are then purchased by

UTA and manufactured in Mexico into wire harnesses. The wire harnesses, which include both imported insulated copper wire and NAFTA-manufactured insulated copper wire, will then be imported into the U.S. by UTA under subheading 8544.30.00, HTSUS.

CBP was asked to assume that the insulated copper wire and the non-insulated copper wire, imported into the NAFTA territory are not "originating goods." Additionally, we were asked to assume that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods".

We were also asked to assume that the value of the non-originating insulated copper wire and the non-insulated copper wire exceeds the *de minimis* amount found in General Note 12(f), HTSUS.

Fact Situation 5

Insulated copper wire classifiable under subheading 8544.49.00, HTSUS, is imported into the NAFTA territory from outside the NAFTA territory. Copper rod classifiable under subheading 7407.10.50, HTSUS, is imported into the NAFTA territory from outside of the NAFTA territory. The copper rod is extruded in the NAFTA territory to form copper wire and then insulated to form insulated copper wire classifiable under subheading 8544.49.00, HTSUS. The imported insulated copper wire and the NAFTA manufactured insulated copper wire are then purchased by UTA and manufactured in Mexico into wire harnesses. The wire harnesses which include both imported insulated copper wire and NAFTA manufactured insulated copper wire, will then be imported into the U.S. by UTA under subheading 8544.30.00, HTSUS.

CBP was asked to assume that the insulated copper wire and the copper rod, imported into the NAFTA territory are not "originating goods." Additionally, we were asked to assume that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods".

We were also asked to assume that the value of the non-originating insulated copper wire exceeds the *de minimis* amount found in General Note 12(f), HTSUS.

Fact Situation 6

Insulated copper wire classifiable under subheading 8544.49.00, HTSUS, is imported into the NAFTA territory from outside the NAFTA territory. Non-insulated copper wire classifiable under heading 7408, HTSUS, is manufactured in the NAFTA territory from NAFTA origin ore and/or NAFTA origin copper rod. The imported insulated copper wire and the NAFTA manufactured non-insulated copper wire are then purchased by UTA and manufactured in Mexico into wire harnesses. The wire harnesses which include both imported insulated copper wire and NAFTA manufactured non-insulated copper wire, will then be imported into the U.S. by UTA under subheading 8544.30.00, HTSUS.

CBP was asked to assume that the insulated copper wire imported into the NAFTA territory is not an "originating good." Additionally, we were asked to assume that all other components of the wire harnesses meet the tariff shift requirements and/or are "originating goods".

We were also asked to assume that the value of the non-originating insulated copper wire exceeds the *de minimis* amount found in General Note 12(f), HTSUS.

With regard to the above fact situations, CBP was asked to disregard the regional value content requirement. Accordingly, regional value content will not be addressed in this ruling.

We note that the classifications mentioned in this ruling were provided by UTA and that CBP does not confirm their accuracy.

ISSUE:

Are the wire harnesses considered to be "originating goods" pursuant to the rules of origin in General Note 12(b)(ii), HTSUS?

LAW AND ANALYSIS:

General Note 12 of the HTSUS incorporates Article 401, North American Free Trade Agreement, as implemented by section 207 of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (December 8, 1993) and the interim amendments to the CBP Regulations, published as T.D. 94-4 (59 Fed. Reg. 109, January 3, 1994), into the HTSUS. Note 12(b) provides in relevant part:

For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as "goods originating in the territory of a NAFTA party" only if -

...

ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that--

A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivision (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivision (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note [.]

Originating goods status is conferred on wire harnesses classified under subheading 8544.30.00, HTSUS, by General Note 12(t)/85.147, HTSUS, which allows:

- (A) A change to subheadings 8544.11 through 8544.60 from any subheading outside that group, except from headings 7408, 7413, 7605 or 7614; or
- (B) A change to subheadings 8544.11 through 8544.60 from headings 7408, 7413, 7605 or 7614, whether or not there is also a change from any other subheading, including another subheading within subheadings 8544.11 through 8544.60, provided there is also a regional value content of not less than:
 - (1) 60 percent where the transaction value method is used, or
 - (2) 50 percent where the net cost method is used.

We note that goods must meet the requirements of either GN 12(t)/85.147(A), HTSUS, or GN 12(t)/85.147(B), HTSUS, to qualify as an "originating good"; they do not have to meet both tests.

General Note 12(t)/85.147(B), HTSUS, requires that, in order for a transformation/tariff shift to occur there must be a change in the tariff classification of a good to subheadings 8544.11 through 8544.60 from heading 7408, 7413, 7605 or 7614, HTSUS, and the good must also have a regional value content of not less than 60% where the transaction value method is used, or 50% where the net cost method is used. A change to subheadings 8544.11 through 8544.60, HTSUS, from any other subheading, including another subheading within subheadings 8544.11 through 8544.60, HTSUS, may only take place if there is also a change in classification of the good from heading 7408, 7413, 7605 or 7614, HTSUS.

General Note 12(f), HTSUS, provides:

- (i) Except as provided in subdivisions (f)(iii) through (vi), inclusive, a good shall be considered to be an originating good if the value of all non-originating materials used in the production of the good that do not undergo an applicable change in tariff classification set out in subdivision (t) of this note is not more than 7 percent of the transaction value of the good, adjusted to a F.O.B. basis, or, if the transaction value is unacceptable under section 402(b) of the Tariff Act of 1930, as amended, the value of all such non-originating materials is not more than 7 percent of the total cost of the good, provided that--
 - (A) if the good is subject to a regional value-content requirement, the value of such non-originating materials shall be taken into account in calculating the regional value content of the good; and
 - (B) the good satisfies all other applicable requirements of this note.

Section 5 of the NAFTA Rules of Origin Regulations, Appendix to Part 181, Customs Regulations (19 C.F.R. Appendix to Part 181), further describes the de minimis rule:

- (1) Except as otherwise provided in subsection (4), a good shall be considered to originate in the territory of a NAFTA country where the value of the non-originating materials that are used in the production of the good and that do not undergo an applicable change in tariff classification as a result of production occurring entirely in the territory of one or more of the NAFTA countries is not more than seven percent
 - (a) of the transaction value of the good determined in accordance with Schedule II with respect to the transaction in which the producer of the good sold the good, adjusted to an F.O.B. basis, or
 - (b) of the total cost of the good, where there is no transaction value for the good under section 2(1) of Schedule III or the transaction value of the good is unacceptable under section 2(2) of that Schedule, provided that,
 - (c) if, under the rule in which the applicable change in tariff classification is specified, the good is also subject to a regional value-content requirement, the value of those non-originating materials shall be

taken into account in calculating the regional value content of the good in accordance with the method set out for that good, and

(d) the good satisfies all other applicable requirements of this appendix.

Applying these laws to the fact situations, our conclusions are as follows:

With regard to Fact Situation 2, as an initial matter, we note that subheading 4016.93.00, HTSUS, is a provision for seals of vulcanized *rubber*, not plastic. However, for the purposes of this ruling only, we will proceed on the fiction that the subject plastic seals are classified in subheading 4016.93.00, HTSUS.

CBP was asked in this situation to assume that, "all other components of the wire harnesses, except for certain plastic seals classifiable under subheading 4016.93.00, HTSUS, meet the tariff shift requirements." (Emphasis added.) We note that this assumption was not applied in the original ruling. Therefore, while we confirm that the conclusion reached in HQ 957188 was technically correct, we find that it was also incomplete.

We were also asked to assume that the value of the imported insulated copper wire was 7%, and the value of the non-originating plastic seals was 2%, of the total cost of each wire harness, where there is no transaction value for the good under section 2(1) of Schedule III, or the transaction value of the good is unacceptable under section 2(2) of Schedule III.

Applying GN 12(f), HTSUS, and Section 5(1) of the NAFTA Rules of Origin Regulations to the assumptions CBP was originally asked to make, we find that the wire harnesses are not considered "originating goods" under the *de minimis* exception. This is because when the assumption that the plastic seals do not undergo a change in tariff classification is applied, the total value of the non-originating materials is more than 7% of the transaction value of the good.

With regard to Fact Situation 3, a change in tariff classification of the insulated copper wire classified in subheading 8544.49.00, HTSUS, does not take place under GN 12(t)/85.147(B), HSTUS, because the requisite shift does not take place from heading 7408, 7413, 7605 or 7614, HTSUS. Further, because we were asked to assume that the value of the non-originating wire exceeds the *de minimis* amount found in GN 12(f), HTSUS, and Section 5(1) of the NAFTA Rules of Origin Regulations, we cannot consider the wire harnesses to be originating goods under NAFTA.

With regard to Fact Situation 4, a change in tariff classification of the insulated copper wire classified in subheading 8544.49.00, HTSUS, does not take place under GN 12(t)/85.147(B), HTSUS, because the requisite shift does not take place from heading 7408, 7413, 7605 or 7614, HTSUS. Further, because we were asked to assume that the value of the non-originating wire exceeds the *de minimis* amount found in GN 12(f), HTSUS, and Section 5(1) of the NAFTA Rules of Origin Regulations, we cannot consider the wire harnesses to be originating goods under NAFTA.

With regard to Fact Situation 5, a change in tariff classification of the insulated copper wire classified in subheading 8544.49.00, HTSUS, does not take place under GN 12(t)/85.147(B), HTSUS, because the requisite shift does not take place from heading 7408, 7413, 7605 or 7614, HTSUS. Further, because we were asked to assume that the value of the non-originating wire exceeds the *de minimis* amount found in GN 12(f), HTSUS, and Section 5(1) of the NAFTA Rules of Origin Regulations, we cannot consider the wire

harnesses to be originating goods under NAFTA. In addition, we take this opportunity to clarify that, in this situation, the copper rod meets the tariff shift requirements of GN 12(t)/85.147(A), but not (B), HTSUS.

With regard to Fact Situation 6, a change in tariff classification of the insulated copper wire classified in subheading 8544.49.00, HTSUS, does not take place under GN 12(t)/85.147(B), HTSUS, because the requisite shift does not take place from heading 7408, 7413, 7605 or 7614, HTSUS. Further, because we were asked to assume that the value of the non-originating wire exceeds the *de minimis* amount found in GN 12(f), HTSUS, and Section 5(1) of the NAFTA Rules of Origin Regulations, we cannot consider the wire harnesses to be originating goods under NAFTA.

HOLDING:

By application of GN 12(t)/85.147 and GN 12(f), HTSUS, the non-originating materials described in the situations above have not been transformed pursuant to the requirements of GN 12(b)(ii)(A), HTSUS. Therefore, in these situations, the wire harnesses produced in Mexico for export to the United States are not eligible for the tariff treatment accorded goods originating in the territory of a NAFTA party, in this case Mexico.

EFFECT ON OTHER RULINGS:

HQ 957188, dated February 1, 1995, is modified with respect to the tariff shift analysis performed pursuant to GN 12(t)/85.147(B), HTSUS, in Fact Situations 2 through 6. The tariff shift analysis performed pursuant to GN 12(t)/85.147(A), HTSUS, including Fact Situation 1, is unchanged.

MYLES B. HARMON,

Director,

Commercial and Trade Facilitation Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay

Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu
Leo M. Gordon*

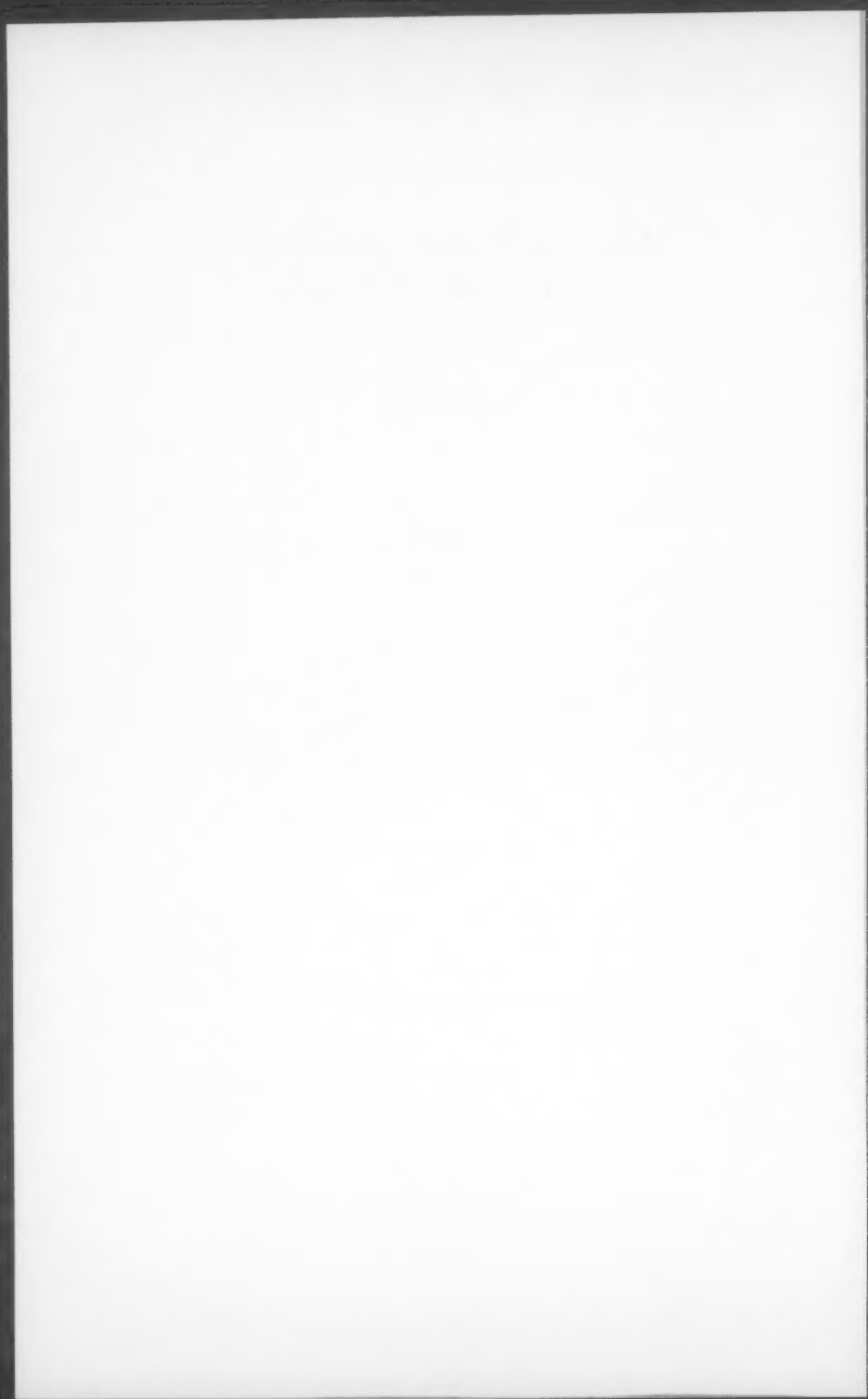
Senior Judges

Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Acting Clerk

Louis Tumminia Jr.

*Entered in duty March 21, 2006.



Decisions of the United States Court of International Trade

Slip Op. 06-83

ABITIBI-CONSOLIDATED INC. AND ITS AFFILIATES ABITIBI-CONSOLIDATED COMPANY OF CANADA, PRODUITS FORESTIERS PETITS PARIS INC., PRODUITS FORESTIERS LA TUQUE INC., PRODUITS FORESTIERS SAGUENAY INC., SOCIETE EN COMMANDITE OPITCIWAN; AND CANFOR CORPORATION AND ITS AFFILIATES CANFOR WOOD PRODUCTS MARKETING LTD., CANADIAN FOREST PRODUCTS, LTD., AND BOIS DAAQUAM INC. (a/k/a DAAQUAM LUMBER INC.), LAKELAND MILLS LTD., AND WINTON GLOBAL LUMBER LTD. (formerly THE PAS LUMBER COMPANY LTD.), Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 06-00048

OPINION

[Motion to dismiss granted.]

Dated: June 1, 2006

Arnold & Porter, LLP (Michael T. Shor) for Plaintiff Abitibi-Consolidated Inc. and its affiliates Abitibi-Consolidated Company of Canada, Produits Forestiers Petits Paris Inc., Produits Forestiers La Tuque Inc., Produits Forestiers Saguenay Inc., and Societe en Commandite Opitciwan;

Baker & McKenzie, LLP (Thomas Peele, Kevin M. O'Brien, and Kevin J. Sullivan) for Plaintiff Canfor Corporation and its affiliates Canfor Wood Products Marketing, Ltd., Canadian Forest Products, Ltd., Bois Daaquam Inc. (a/k/a Daaquam Lumber Inc.), Lakeland Mills Ltd., and Winton Global Lumber Ltd. (formerly the Pas Lumber Company Ltd.);

Stepcoe & Johnson, LLP (W. George Grandison, Mark A. Moran, Matthew Frumin, and Daniel J. Calhoun) for Plaintiff-Intervenors British Columbia Lumber Trade Council, Coast Forest Products Association, and Council of Forest Industries;

Wilmer, Cutler, Pickering, Hale, and Dorr, LLP (Robert C. Cassidy, Jr., John D. Greenwald, Jack A. Levy, and Tammy J. Horn) for Plaintiff-Intervenors the Quebec Lumber Manufacturers Association;

Baker & Hostetler, LLP (Elliot J. Feldman, Bryan J. Brown, and John Burke) for Plaintiff-Intervenors Ontario Forest Industries Association and Ontario Lumber Manufacturers Association;

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Claudia Burke*, Trial Attorney and *Quentin M. Baird*, Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce) for Defendant United States;

Dewey Ballantine, LLP (*Bradford L. Ward* and *David A. Bentley*) for Defendant-Intervenor Coalition for Fair Lumber Imports Executive Committee.

Gordon, Judge: In this action, plaintiffs and plaintiff-intervenors challenge the United States Department of Commerce's ("Commerce") respondent selection determinations in the third administrative review of the antidumping duty order covering softwood lumber from Canada. Defendant and defendant-intervenor move, pursuant to USCIT Rule 12(b)(1), to dismiss this action for lack of subject matter jurisdiction. For the following reasons, the motion is granted.

I. Background

The third review currently is proceeding with final results due in September, 2006 (or December, 2006 if extended). It covers imports of the subject merchandise for the period May 1, 2004 through April 30, 2005 and nearly 300 Canadian exporters or producers, including plaintiffs. *Certain Softwood Lumber from Canada*, 70 Fed. Reg. 37,749 (June 30, 2005) (initiation of administrative review).

Given the large number of companies in the third review, Commerce had to address the threshold question of respondent selection. In the first and second reviews, Commerce selected eight of the largest respondents based on volume of exports pursuant to Section 777A(c)(2)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677f-1(c)(2)(B) (2000) (all further citations to the Tariff Act of 1930 are to the relevant provision in Title 19 of the U.S. Code, 2000 edition). In the third review, Commerce changed course and decided to limit the number of respondents using a "probability proportional to size" sampling method pursuant to 19 U.S.C. § 1677f-1(c)(2)(A). Plaintiffs were examined in the first and second reviews, but were not selected for examination under Commerce's newly applied sampling method in the third.

When plaintiffs learned they were not selected, they voluntarily responded to Commerce's third review questionnaires and submitted their sales and cost data well in advance of the deadlines for such submissions, all of which Commerce declined to examine pursuant to 19 U.S.C. § 1677m(a). Rather than await the final results of the review, plaintiffs commenced this challenge to Commerce's respondent selection, seeking a writ of mandamus directing Commerce to accept plaintiffs as voluntary respondents. Alternatively, they seek to preliminarily enjoin the third review pending selection of a statistically valid sample under 19 U.S.C. § 1677f-1(c)(2)(A), or selection of "exporters and producers accounting for the largest volume of the sub-

ject merchandise from the exporting country that can be reasonably examined," as provided for under 19 U.S.C. § 1677f-1(c)(2)(B).

II. Standard of Review

"Plaintiffs carry the burden of demonstrating that jurisdiction exists." *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 422, 795 F. Supp. 428, 432 (1992) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In deciding a motion to dismiss for lack of subject matter jurisdiction, the court assumes "all factual allegations to be true and draws all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). The court, however, does not similarly credit plaintiff's legal conclusions or arguments. See authorities cited in *Falwell v. City of Lynchburg*, 198 F. Supp. 2d 765, 772 (W.D.Va. 2002).

III. Discussion

A. Jurisdiction under 28 U.S.C. § 1581(c)

Plaintiffs do not assert jurisdiction under 28 U.S.C. § 1581(c) where challenges to Commerce decision-making in antidumping administrative reviews ordinarily lie. That avenue requires a "final determination," 19 U.S.C. § 1516a(a)(2)(B)(iii), and is available when Commerce publishes its final results of the third review in the *Federal Register*. 19 U.S.C. § 1516(a)(2). Although plaintiffs were not selected as mandatory respondents, and Commerce has declined to examine their voluntary responses, plaintiffs may continue to participate in the third review as interested parties. Plaintiffs may submit case briefs commenting on the preliminary results, including Commerce's respondent selection determinations. 19 C.F.R. § 351.309 (2004). No antidumping duty assessment will be made or cash deposit rate determined for any respondent until the final results are issued. Once those are issued, interested parties may challenge them in this Court under 28 U.S.C. § 1581(c) as a reviewable final determination under 19 U.S.C. § 1516a(a)(2)(B)(iii).

Plaintiffs, though, are not waiting for section 1581(c) jurisdiction to attach. They seek immediate relief under 28 U.S.C. § 1581(i), the Court's oft-litigated residual jurisdiction provision.

B. Jurisdiction under 28 U.S.C. § 1581(i)

At first blush, plaintiffs' assertion of section 1581(i) jurisdiction during an ongoing antidumping proceeding appears to collide with the express direction that section 1581(i) does "not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . by the Court of International Trade under section 516A(a) of the Tariff Act of 1930. . . ." 28 U.S.C. § 1581(i). Essentially, the requisites for section 1581(i) jurisdiction are not satis-

fied by a challenge to antidumping determinations that will be "incorporated in or superceded by" the final results of an ongoing administrative review because section 1581(c) is the exclusive method of judicial review. H.R. Rep. No. 96-1235, at 48 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 3729, 3759-60 ("[I]t is the intent of the Committee that the Court of International Trade not permit section (i), and in particular paragraph (4), to be utilized to circumvent the exclusive method of judicial review of those antidumping and countervailing duty determinations listed in section 516A of the Tariff Act of 1930 (19 U.S.C. § 1516a), as provided in that section. . . . The Committee intends that any determination specified in section 516A of the Tariff Act of 1930, or any preliminary administrative action which, in the course of the proceeding, will be, directly or by implication, incorporated in or superceded by any such determination, is reviewable exclusively as provided in section 516A."). These requisites discourage piecemeal review of antidumping determinations. They are problematical for plaintiffs who are challenging preliminary administrative actions regarding respondent selection that will be incorporated in or superceded by the final results of the third review.

Admittedly, there are circumstances in which the Court has exercised its residual jurisdiction "to review certain actions taken by Commerce during the pendency of an [administrative proceeding]." *Macmillan Bloedel Ltd. v. United States*, 16 CIT 331, 331 (1992). *See also, Sacilor, Acieries et Laminoirs De Lorraine v. United States*, 3 CIT 191, 542 F. Supp. 1020 (1982) (exercising section 1581(i) jurisdiction during an antidumping investigation to enjoin the agency from disclosing confidential information); *Dofasco Inc. v. United States*, 28 CIT ___, 326 F. Supp. 2d 1340, *aff'd*, 390 F.3d 1370 (Fed. Cir. 2004) (exercising section 1581(i) jurisdiction to review timeliness of request for administrative review, which, if untimely, would have precluded the review); H.R. Rep. No. 96-1235, at 48 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 3729, 3760 ("[S]ubsection (i), and in particular paragraph (4), makes it clear that the court is not prohibited from entertaining a civil action relating to an antidumping or countervailing duty proceeding so long as the action does not involve a challenge to a determination specified in section 516A of the Tariff Act of 1930."). The shorthand rule provides that the Court's residual jurisdiction under section 1581(i) attaches only if a remedy under another section of 1581 is unavailable or "manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987).

Applying this standard to other interlocutory challenges of ongoing antidumping or countervailing duty proceedings, this Court has declined to exercise section 1581(i) jurisdiction because the remedies under section 1581(c) were available, adequate, and reviewable. *See, e.g., Macmillan Bloedel*, 16 CIT at 332 (dismissing for lack of jurisdiction an interlocutory challenge to initiation of countervailing duty

investigation and noting, "[I]f Macmillan Bloedel will have a meaningful opportunity after the final determination to challenge Commerce's decision denying its exclusion request, then the court must stay its hand at this stage of the proceedings"; *NSK v. United States*, 28 CIT ___, 350 F. Supp. 2d 1128 (2004) (dismissing for lack of jurisdiction an interlocutory challenge to Commerce's selection of model matching methodology for antidumping administrative review). *Tokyo Kikai Seisakusho, Ltd. v. United States*, 29 CIT ___, 403 F. Supp. 2d 1287 (2005) (dismissing for lack of jurisdiction an interlocutory challenge to initiation of changed circumstances review that would be reviewable under 28 U.S.C. § 1581(c)).

C. Jurisdiction under § 1581(i) for Administrative Procedure Act Claim

To avoid the problem presented by the above-quoted language from section 1581(i), plaintiffs contend that their specific challenge to Commerce's respondent selection in the pending administrative review is not listed in section 516A, and that the express exclusion in section 1581(i) does not apply to their action. (Motion Hr'g Tr. 69.) Plaintiffs instead assert that their action arises under Section 702 of the Administrative Procedure Act ("APA"), (Pls.' Opp'n to Mot. to Dismiss 20 n.8.), which they have standing to invoke pursuant to 28 U.S.C. § 2631(i) (2000). The plaintiffs in *Tokyo Kikai* shared a similar theory of jurisdiction. As in *Tokyo Kikai*, the APA based action here raises "jurisdictional problems that are insurmountable." 403 F. Supp. 2d at 1292.

Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (2000). The APA further provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (2000). (This APA provision is mirrored in the court's residual jurisdiction case law, which as noted above prescribes that section 1581(i) supplies jurisdiction only if a remedy under another section of 1581 is unavailable or manifestly inadequate.) Section 704 of the APA also provides that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action," 5 U.S.C. § 704 (2000). Plaintiffs' challenge to Commerce's respondent selection thus implicates questions of ripeness, which Defendant has raised in its motion to dismiss. (Def.'s Mem. in Support of Mot. to Dismiss 12-15.)

1. Ripeness

Ripeness "is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Park Hospitality Ass'n v. U.S. Dep't of Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149 (1967)). The ripeness inquiry evaluates "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality* 538 U.S. at 807 (citing *Abbott Labs.*, 387 U.S. at 148).

Plaintiffs challenge two specific Commerce actions regarding respondent selection in the third review. The first is Commerce's failure to examine plaintiffs' voluntary submissions and to compute an individual dumping margin for each of them. The second concerns Commerce's decision to select a sample of respondents under 19 U.S.C. § 1677f-1(c)(2)(A). Neither decision is ripe for review.

a. Fitness of Issues for Judicial Decision

On the first question, namely the fitness of the issues for judicial decision, the court considers "whether the issue presented is a purely legal one, [and] whether consideration of that issue would benefit from a more concrete setting." *Ciba-Geigy Corp. v. U.S. Envtl. Prot. Agency*, 801 F.2d 430, 435 (D.C. Cir. 1986). As explained below, consideration of Commerce's respondent selection decisions will benefit from a more concrete setting.

(i) Voluntary Respondent Claim

In challenging Commerce's refusal to examine their voluntary submissions, plaintiffs contend that Commerce *must* accept voluntary respondents when the agency limits the number of respondents examined in an administrative review. 19 U.S.C. § 1677m provides in pertinent part:

- (a) Treatment of voluntary responses in countervailing or anti-dumping duty investigations and reviews

In any investigation . . . or a review . . . in which the administering authority has, under section 1677f-1(c)(2) . . . , limited the number of exporters or producers examined, . . . the administering authority *shall establish* . . . an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination under such sections who submits to the administering au-

thority the information requested from exporters or producers selected for examination, if--

- (1) such information is so submitted by the date specified—
... and
- (2) the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of *the investigation*.

19 U.S.C. § 1677m (emphasis added). As noted earlier, plaintiffs timely submitted their voluntary questionnaire responses. Plaintiffs contend that under the plain meaning of the statute they are entitled to an individual weighted average dumping margin. According to plaintiffs, this action involves a review *and not* an "investigation," and Commerce therefore cannot apply the "unduly burdensome" and "timely completion" factors of subparagraph (a)(2). Plaintiffs further contend that even if Commerce had the authority to decline to examine voluntary respondents in an administrative review based on the factors in subparagraph (a)(2), Commerce failed to make the necessary findings that individual examination of the voluntary responses would in fact be "unduly burdensome and inhibit the timely completion" of the review. 19 U.S.C. § 1677m.

The main thrust of plaintiffs' challenge, though, concentrates on the proper construction of section 1677m. To resolve that issue the court applies the two-step inquiry of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). At this stage of the proceedings, however, Commerce has yet to render a considered response to plaintiffs' arguments, simply notifying plaintiffs in separate one-page letters of Commerce's refusal to examine their voluntary submissions. (App. D24, D25.). The record only shows that Commerce declined to examine plaintiffs' voluntary submissions based on Commerce's belief that it has discretion to do so under the statute. *Id.*

To apply the standard of review properly, the court must know Commerce's considered response to plaintiffs' arguments, which will include Commerce's interpretation of section 1677m, and Commerce's prior practices in dealing with large numbers of respondents. To obtain this information now, the court would have to remand the matter to Commerce and disrupt the administrative proceeding. By waiting for completion of the review, this information will, in all likelihood, manifest itself in the final results through Commerce's response to plaintiffs' case briefs. Exercising jurisdiction at this time would deprive Commerce of the opportunity to provide "an explanation of the basis for its determination that addresses relevant argu-

ments. . . ." 19 U.S.C. § 1677f(i)(3)(A), which in this instance is not helpful or efficient for the court, the interested parties, or the agency.

(ii) Sampling Selection Claim

Commerce announced its "probability proportional to size" sampling method for respondent selection in a detailed memorandum analyzing hundreds of pages of comments from the parties and culminating in a recommendation to the Deputy Assistant Secretary for Import Administration, with which he agreed. (App D.23.) In challenging Commerce's "probability proportional to size" sampling method, plaintiffs allege that the selection of only eight respondents lacked statistical validity and was solely based, impermissibly, on Commerce's purported resource constraints. Commerce divided the review population into two strata—one comprising the 16 largest producers (based on production volume), and one comprising the 283 remaining small producers. Commerce then randomly picked six companies from the large producer stratum and two from the small. The applicable statutory provision, 19 U.S.C. § 1677f-1, provides in pertinent part:

(b) Selection of averages and samples

The authority to select averages and statistically valid samples shall rest exclusively with the administering authority. The administering authority shall, to the greatest extent possible, consult with the exporters and producers regarding the method to be used to select exporters, producers, or types of products under this section.

(c) Determination of dumping margin

(1) General rule

In determining weighted average dumping margins under section 1673b(d), 1673d(c), or 1675(a) of this title, the administering authority shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.

(2) Exception

If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to--

- (A) a sample of exporters, producers, or types of products *that is statistically valid based on the information available to the administering authority at the time of selection, or*
- (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

19 U.S.C. § 1677f-1 (emphasis added).

Plaintiffs' argument that Commerce's approach is not statistically valid may have merit. Whatever the merits of plaintiffs' claim, however, immediate judicial intervention in the third review is inappropriate because further development of the administrative record will enable more efficient judicial review of Commerce's sampling methodology than at present. The statute vests Commerce with exclusive authority to select a statistically valid sample, a grant of authority bounded by the requirement of statistical validity. The court cannot direct Commerce which sampling approach to use. Instead, the court can only review Commerce's chosen method to determine whether it is statistically valid. To do so, the court must know the measure of statistical validity, which the statute does not define. Commerce, and not the court, needs to wrestle with this issue in the first instance. The court should not entangle itself in this issue before Commerce has had the opportunity to formalize its determination in the final results. In short, the administrative proceeding needs to be completed. That process has begun; it needs to finish.

b. Hardship of Withholding Court Consideration & Adequacy of Remedy under § 1581(c).

The second prong of the ripeness test concentrates on the "the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality*, 538 U.S. at 807 (citing *Abbott Labs.*, 387 U.S. at 178). This hardship prong is reflected in the "manifest inadequacy" requirement of the court's residual jurisdiction case law.

Plaintiffs advance three principal reasons why their remedy under section 1581(c) is manifestly inadequate: (1) their records, documentation, and personnel will degrade in some form or another waiting for a corrective remedy under section 1581(c), subjecting them to a potential adverse facts available finding when it arrives (Compl. ¶ 4.); (2) their businesses have been beset by unnecessary operational uncertainty that can only be cured by immediate action under section 1581(i) (Compl. ¶ 5-6.), and; (3) their pursuit of remedies under section 1581(c) will require that a time-consuming and expensive administrative proceeding essentially has "to be restarted anew" if they prevail. (Compl. ¶ 8.) These hardships, however real and diffi-

cult, do not prevent section 1581(c) from affording plaintiffs an adequate remedy.

(i) Records and Personnel Degradation

Plaintiffs contend that Commerce's respondent selection decisions have deprived them of their statutory rights to their own weighted average dumping margins and duty assessment rates and that it "likely would be early 2008" before that deprivation can be remedied under section 1581(c). At that time, plaintiffs claim they will be exposed to an "increased and high risk" of application of adverse facts available by Commerce because, due to the passage of time, their documentation and records may likely be more difficult or impossible to locate years from now, and plaintiffs' personnel will no longer be employed or recall the precise reasons for their transactions and entries years after the fact. (Compl. ¶ 4.) Assuming this allegation is true, it nevertheless does not render plaintiffs' remedy under section 1581(c) manifestly inadequate.

Plaintiffs' allegation reflects a basic requirement of the antidumping statute—the maintenance of necessary records and documentation to substantiate questionnaire responses during the process of verification. *See* 19 U.S.C. § 1677m(i). It also reflects a potential consequence for failing to do so—Commerce draws an adverse inference from an interested party's failing "to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). A continuing obligation to maintain records and institutional information during subsequent judicial review of the administrative proceeding is an unremarkable condition of the antidumping statute and of litigation generally. That reality, though, does not render the remedy under section 1581(c) manifestly inadequate and establish a basis for section 1581(i) jurisdiction. Instead, plaintiffs know the posture of their case and can evaluate the prospects and relative benefits of pursuing relief under section 1581(c) and take whatever measures they deem necessary to achieve the desired result, including the preservation of documents, records, and personnel.

(ii) Business Uncertainty

Plaintiffs also contend that Commerce's unlawful respondent selection has caused them to suffer an unnecessary competitive disadvantage in the market because key competitors including Tembec, West Fraser, and Weyerhaeuser are mandatory respondents and are able to obtain their own margins of dumping, duty assessment rates, and cash deposit rates, whereas plaintiffs cannot. (Compl. ¶ 5.) Armed with the superior knowledge of their own circumstances, these competitors "can plan their lumber production and sales over the next couple of years," whereas plaintiffs cannot. *Id.* Additionally,

Plaintiff Abitibi alleges that the uncertainty now plaguing its operating decisions is further magnified by its "difficult financial circumstances, following three consecutive years of substantial operating losses." (Compl. ¶ 6.) Plaintiff Abitibi contends that it is now critical to evaluate the profitability and cash flow implications of new saw-mill acquisitions or joint ventures to access raw material inputs, which it cannot do given the "high degree of uncertainty regarding Abitibi's future antidumping duty assessment and cash deposit rates." *Id.*

Again, assuming these allegations to be true, they do not render the relief available under section 1581(c) manifestly inadequate. Such uncertainty is an ordinary effect of the antidumping regime, and therefore, the disruptions it entails cannot constitute a basis under which the court bypasses section 1581(c) jurisdiction in favor of section 1581(i). The court cannot sensibly hold otherwise and thereby invite challenges to Commerce's interim determinations that introduce such business uncertainty during an administrative review. The absence of certainty regarding the dumping margins and final assessment of antidumping duties is a characteristic of the retrospective system of administrative reviews designed by Congress. See *D&L Supply Co. v. United States*, 17 CIT 1419, 1422, 841 F. Supp. 1312, 1315 (1993) ("the uncertainty of knowing the final amount of duties due at the time of entry is simply an inherent part of importing merchandise into the United States.").

(iii) Repeating a Time Consuming and Expensive Administrative Proceeding

Plaintiffs contend that if they wait and ultimately prevail in a challenge under section 1581(c), a "time-consuming and expensive administrative proceeding" would essentially have to be started anew. (Compl. ¶ 8.) Assuming that this is indeed the likely result of a court ordered remand under section 1581(c), such inconvenience and expense are inherent in the administrative and judicial review process and cannot therefore constitute manifest inadequacy for what is the normal jurisdictional scheme. See *Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1353 (Fed. Cir. 2000) (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) ("Mere litigation expense, even substantial and unrecoverable cost, does not constitute irreparable injury.")). Plaintiffs' situation is no different from any other respondent that disagrees with an approach or methodology Commerce has taken that requires different information and documents from those that would be necessary under an interested party's preferred approach.

IV. CONCLUSION

Commerce's respondent selection determinations are interim in nature, and will be incorporated in or superceded by the final results of the third review. Those final results are reviewable under 19 U.S.C. § 1516a(a)(2)(B)(iii), and therefore 28 U.S.C. § 1581(c) is the exclusive means of judicial review for plaintiffs' claims. Alternatively, Commerce's respondent selection determinations are not ripe for review. In sum, plaintiffs' remedy under 28 U.S.C. § 1581(c) is not manifestly inadequate. Therefore, section 1581(i) jurisdiction is not available for plaintiffs' action. The court does not reach the question of standing raised by defendant-intervenors. Judgment dismissing this action will be entered accordingly.

Slip Op. 06-85

BEFORE: RICHARD K. EATON, JUDGE

ZHEJIANG NATIVE PRODUCE & ANIMAL BY-PRODUCTS IMPORT & EXPORT CORP., ET AL., Plaintiffs, v. UNITED STATES, Defendant.

Court No. 02-00057

ORDER

[Matter remanded to United States Department of Commerce]

Dated: June 6, 2006

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (Adam M. Dambrov, Bruce M. Mitchell, and Mark E. Pardo), for plaintiffs Zhejiang Native Produce & Animal By-Products Import & Export Corp., Kunshan Foreign Trade Co., China (Tushu) Super Food Import & Export Corp., High Hope International Group Jiangsu Foodstuffs Import & Export Corp., National Honey Packers & Dealers Association, Alfred L. Wolff, Inc., C.M. Goettsche & Co., China Products North America, Inc., D.F. International (USA), Inc., Evergreen Coyle Group, Inc., Evergreen Produce, Inc., Pure Sweet Honey Farm, Inc., and Sunland International, Inc.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Reginald T. Blades, Jr.); Robert LaFrankie, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Collier Shannon Scott, PLLC (Michael J. Coursey, John M. Herrmann), for defendant-intervenors American Honey Producers Association and Sioux Honey Association.

This matter comes before the court pursuant to the decision of the United States Court of Appeals for the Federal Circuit ("CAFC") in *Zhejiang Native Produce & Animal By-Products Import & Export*

Corp. v. United States, 432 F.3d 1363 (Fed. Cir. 2005), and the CAFC mandate of February 21, 2006, reversing and remanding the judgment of this court in *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 28 CIT ___, slip op. 04-109 (Aug. 26, 2004) (not reported in the Federal Supplement).

In its decision, the CAFC held that substantial evidence did not support the finding of critical circumstances by the United States Department of Commerce ("Commerce") based on an imputation of knowledge to plaintiffs that their honey was being sold, or was likely to be sold, in the United States at less than fair value.

Therefore, in accordance with the CAFC's mandate, it is hereby ORDERED that this matter is remanded to Commerce for further consideration of its critical circumstances finding, provided that in no event shall Commerce impute to plaintiffs any knowledge prohibited by the CAFC's decision, and it is further

ORDERED that Commerce's remand results are due on September 4, 2006, comments are due on October 4, 2006, and replies to such comments are due on October 16, 2006.

Slip Op. 06-86

MERCK & CO., INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Judith M. Barzilay, Judge
Court No. 02-00759

OPINION

[Plaintiff's motion for summary judgment is denied, and Defendant's motion for summary judgment is granted.]

Dated: June 6, 2006

Galvin & Mlawski (John J. Galvin) for Plaintiff Merck & Co., Inc.

Peter D. Keisler, Assistant Attorney General; (*Barbara S. Williams*) Attorney in Charge, International Trade Field Office; (*Edward F. Kenny*) Civil Division, Commercial Litigation Branch, United States Department of Justice; *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, of counsel, for Defendant United States.

BARZILAY, JUDGE: Plaintiff Merck & Co., Inc. ("Merck"), has brought this action against the United States to contest Customs' denial of its timely-filed protest claim for "substitution unused merchandise duty drawback" on exports of substitute, fungible non-NAFTA origin goods to Canada and Mexico. *See* Pl.'s Mot. Summ. J. 1. Plaintiff asserts that pursuant to the relevant statutes, 19 U.S.C. §§ 1313(j)(2) & (4), 3333(a) (2000), its shipments of the merchandise

in question to Canada and Mexico constitute "exports" and therefore are not subject to NAFTA drawback restrictions; Defendant contends otherwise. Both parties have filed motions for summary judgment. For the reasons given below, Defendant's motion for summary judgment is granted, and Plaintiff's motion for summary judgment is denied.

I. Procedural History

A. The Statutory Framework for Duty Drawback

Duty drawback provisions traditionally permit importers to obtain duty refunds upon exportation for articles produced with merchandise imported into the United States, *see* 19 U.S.C. § 1313(a),¹ or produced with substitute merchandise, domestic or imported, of the same kind as the imported merchandise ("substitution drawback"), *see* § 1313(b).² In 1980, Congress amended the laws to allow drawback on imported merchandise not used in the United States and exported in the same condition as when it was imported ("unused merchandise drawback"). *See* § 1313(j)(1) (1980).³ In 1984, an additional

¹In relevant part, the statute states that:

"(a) Articles made from imported merchandise

Upon the exportation . . . of articles manufactured or produced in the United States with the use of imported merchandise, . . . the full amount of the duties paid upon the merchandise so used shall be refunded as drawback. . . ."

19 U.S.C. § 1313(a).

²In relevant part, the statute states that:

(b) Substitution for drawback purposes

If imported duty-paid merchandise and any other merchandise (whether imported or domestic) of the same kind and quality are used in the manufacture or production of articles . . . , there shall be allowed upon the exportation . . . of any such articles, notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported . . . articles, an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported, but only if those articles have not been used prior to such exportation

19 U.S.C. § 1313(b).

³The relevant part of the subsection read:

(j) same condition drawback.

(1) If imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law because of its importation—,

(A) is . . . ,

(i) exported in the same condition as when imported . . . ; and

(B) is not used within the United States before such exportation . . . ; then upon such exportation . . . the amount of each such duty, tax, and fee so paid shall be refunded as drawback.

19 U.S.C. § 1313(j) (1980).

modification legalized substitution unused merchandise drawback. See § 1313(j)(3) (1984).⁴

Passage of the North American Free Trade Agreement Implementation Act ("NAFTAIA"), Pub. L. No. 103-182, 107 Stat. 2060-2164 (1993), codified at 19 U.S.C. §§ 3301-3473 (2000), substantially amended the duty drawback system. Crucially, the NAFTAIA added subsection 1313(j)(4) to the statute and thereby eliminated "substitution unused merchandise drawback" for exports to Mexico and Canada, except for merchandise delineated in § 3333(a)(1)-(8). See §§ 1313(j)(2) & (4), 3333(a) (2000). These exceptions were included in the statute to preserve certain manufacturing and specialized duty deferral programs. H.R. Rep. No. 103-361(I), at 39 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2589.

B. The Present Case

On May 25, 1993, Merck imported 35 kilograms of the chemical compound N-(aminosulfonyl)-3-(((2-((diaminomethylene) amino)-4-thiazolyl) methyl) thio) propanimidamide, otherwise known as Famotidine, from its manufacturer Yamanouchi Ireland Co., Ltd., of Dublin, Ireland, at a duty rate of 6.9% *ad valorem*. During July and August 1995, Merck imported duty-free⁵ an additional 1,195 kilograms of Famotidine. On July 13 and August 4, 1995, the firm then exported 35 kilograms of Famotidine from the 1995 transactions ("the substitute merchandise") to Mexico and Canada, respectively, hoping to secure a substitution unused merchandise drawback claim based upon the 35 kilograms of Famotidine that it imported in 1993 ("the designated merchandise") pursuant to the NAFTA drawback

⁴Today the modified text of this subsection falls under paragraph (j)(2). This subsection in relevant part read:

(3) If there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law because of its importation, any other merchandise (whether imported or domestic) that—

(A) is fungible with such imported merchandise;

(B) is . . . exported . . . ;

(C) before such exportation . . . —

(i) is not used within the United States, and

(ii) is in the possession of the party claiming drawback under this paragraph; and

(D) is in the same condition at the time of exportation . . . as was the imported merchandise at the time of its importation; then upon the exportation . . . of such other merchandise the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback. . . .

19 U.S.C. § 1313(j)(3) (1984).

⁵Pursuant to the Uruguay Round Trade Agreement, tariffs on pharmaceutical products were eliminated effective January 1, 1995.

exception in § 3333(a)(2).⁶ See Pl.'s Mot. Summ. J. 7-8, 13; Def.'s Mot. Summ. J. & Resp. Def.'s Mot. Summ. J. 2-3.

Customs denied Merck's drawback claim, asserting that statute prohibits "substitution unused merchandise drawback" for exports to NAFTA countries and that Merck's claim did not fit into any of the eight exceptions in § 3333(a). Customs liquidated the entries on July 31, 1998. See Def.'s Mot. Summ. J. & Resp. Pl.'s Mot. Summ. J. 3; Def.'s Statement Material Facts 1. Merck subsequently filed a protest, which Customs denied on June 14, 2002. Customs reasoned that

the goods exported to Canada and Mexico [were] not the imported goods upon which the drawback claim [was] based, but [were] the substitute goods. The designated imported merchandise, which [was] not exported, [was] the basis for the drawback claim. As it [was] not exported, it [was] not merchandise described in paragraph (2) of section 3333(a) . . . and cannot be the basis for a claim under § 1313(j)(2).

HQ 228781 of June 20, 2002, at *2. Merck then filed the present action in this Court, which has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a).

II. Standard of Review

This Court will grant a party summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988). In its evaluation, "[t]he Court may not resolve or try factual issues." *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988), *aff'd*, 867 F.2d 1404 (Fed. Cir. 1989). To determine whether there exists a genuine issue of material fact, the court must view the proffered evidence "in the light most favorable to the party opposing the motion, with doubts resolved in favor of the opponent." *Dow Agroscis. LLC v. Crompton Corp.*, No. 2005-1524, Slip. Op. at *4 (Fed. Cir. May 5, 2006) (not reported in F. Supp.)

⁶The exception reads:

(2) A good exported to a NAFTA country in the same condition as when imported into the United States. For purposes of this paragraph— (A) processes such as testing, cleaning, repacking, or inspecting a good, or preserving it in its same condition, shall not be considered to change the condition of the good, and (B) except for a good referred to in paragraph 12 of section A of Annex 703.2 of the Agreement that is exported to Mexico, if a good described in the first sentence of this paragraph is commingled with fungible goods and exported in the same condition, the origin of the good may be determined on the basis of the inventory methods provided for in the regulations implementing this title.

19 U.S.C. § 3333(a)(2).

(quoting *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.*, 145 F.3d 1303, 1307 (Fed. Cir.1998)) (quotations omitted). Absent a finding of "disputes over facts that might affect the outcome of the suit under the governing law," summary judgment will be entered for the moving party. *Anderson*, 477 U.S. at 248.

III. Discussion

A. Statutory Interpretation

This case centers on the parties' conflicting interpretations of 19 U.S.C. § 1313(j)(4)(A)⁷ when viewed in conjunction with §§ 1313(j)(2) and 3333(a).⁸ When undertaking an examination of a

⁷ At the time relevant in this case, § 1313(j)(4)(A) was codified as § 1313(j)(4). Upon the passage of the U.S.-Chile Free Trade Agreement Implementation Act, paragraph (4) became (4)(A). For convenience, this opinion will refer to this paragraph as (4)(A).

⁸ Section 1313(j), in relevant part and at all relevant times, provides:

(j) Unused merchandise drawback.

...
(2) Subject to paragraph (4), if there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation, any other merchandise (whether imported or domestic), that—

(A) is commercially interchangeable with such imported merchandise;

(B) is, before the close of the 3-year period beginning on the date of importation of the imported merchandise, either exported or destroyed under customs supervision; and
(C) before such exportation or destruction—

(i) is not used within the United States, and

(ii) is in the possession of, including ownership while in bailment, in leased facilities, in transit to, or in any other manner under the operational control of, the party claiming drawback under this paragraph, if that party—

(I) is the importer of the imported merchandise,

...
then, notwithstanding any other provision of law, upon the exportation or destruction of such other merchandise the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback under this subsection, but in no case may the total drawback on the imported merchandise, whether available under this paragraph or any other provision of law or any combination thereof, exceed 99 percent of that duty, tax, or fee.

...
(4)(A) Effective upon the entry into force of the North American Free Trade Agreement, the exportation to a NAFTA country, as defined in section 2(4) of the North American Free Trade Agreement Implementation Act [19 U.S.C.A. § 3301(4)], of merchandise that is fungible with and substituted for imported merchandise, other than merchandise described in paragraphs (1) through (8) of section 203(a) of that Act [19 U.S.C.A. § 3333(a)], shall not constitute an exportation for purposes of paragraph (2).

...
19 U.S.C. § 1313(j) (emphasis added). Section 3333 in relevant part reads:

(a) "Good subject to NAFTA drawback" defined

For purposes of this Act and the amendments made by subsection (b) of this section, the term "good subject to NAFTA drawback" means any imported good other than the following:

(1) A good entered under bond for transportation and exportation to a NAFTA country.

(2) A good exported to a NAFTA country in the same condition as when imported into the United States. For purposes of this paragraph—

(A) processes such as testing, cleaning, repacking, or inspecting a good, or preserving it

statute's meaning, a court must first look to "the statutory language itself [as] the best indication of congressional intent." *Alaskan Arctic Gas Pipeline Co. v. United States*, 831 F.2d 1043, 1046 (Fed. Cir. 1987); see *United States v. Azeem*, 946 F.2d 13, 17 (2d Cir. 1991); *United States v. Kung Chen Fur Corp.*, 188 F.2d 577, 583-84 (C.C.P.A. 1951). During this initial textual analysis, "the entire context of the statute must be considered and every effort made to give full force and effect to all language contained therein." *Dart Exp. Corp. v. United States*, 43 C.C.P.A. 64, 74 (1956) (citations omitted) (not reported in F.2d); see *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48,

in its same condition, shall not be considered to change the condition of the good, and (B) except for a good referred to in paragraph 12 of section A of Annex 703.2 of the Agreement that is exported to Mexico, if a good described in the first sentence of this paragraph is commingled with fungible goods and exported in the same condition, the origin of the good may be determined on the basis of the inventory methods provided for in the regulations implementing this title.

(3) A good—

(A) that is—

(i) deemed to be exported from the United States,

(ii) used as a material in the production of another good that is deemed to be exported to a NAFTA country, or

(iii) substituted for by a good of the same kind and quality that is used as a material in the production of another good that is deemed to be exported to a NAFTA country, and

(B) that is delivered—

(i) to a duty-free shop,

(ii) for ship's stores or supplies for ships or aircraft, or

(iii) for use in a project undertaken jointly by the United States and a NAFTA country and destined to become the property of the United States.

(4) A good exported to a NAFTA country for which a refund of customs duties is granted by reason of—

(A) the failure of the good to conform to sample or specification, or

(B) the shipment of the good without the consent of the consignee.

(5) A good that qualifies under the rules of origin set out in section 3332 of this title that is—

(A) exported to a NAFTA country,

(B) used as a material in the production of another good that is exported to a NAFTA country, or

(C) substituted for by a good of the same kind and quality that is used as a material in the production of another good that is exported to a NAFTA country.

(6) A good provided for in subheading 1701.11.02 of the HTS that is—

(A) used as a material, or

(B) substituted for by a good of the same kind and quality that is used as a material, in the production of a good provided for in existing Canadian tariff item 1701.99.00 or existing Mexican tariff item 1701.99.01 or 1701.99.99 (relating to refined sugar).

(7) A citrus product that is exported to Canada.

(8) A good used as a material, or substituted for by a good of the same kind and quality that is used as a material, in the production of—

(A) apparel, or

(B) a good provided for in subheading 6307.90.99 (insofar as it relates to furniture moving pads), 5811.00.20, or 5811.00.30 of the HTS, that is exported to Canada and that is subject to Canada's most-favored-nation rate of duty upon importation into Canada.

Where in paragraph (6) a good referred to by an item is described in parentheses following the item, the description is provided for purposes of reference only.

58-59 (1878) ("Congress is not to be presumed to have used words for no purpose. . . . [N]o words are to be treated as surplusage or as repetition."); *Faus Group, Inc. v. United States*, 28 CIT ___, ___, 358 F. Supp. 2d 1244, 1261 (2004).

[I]f the language of a statute is clear and plain, its obvious meaning must be adopted by the court[]; yet, in the presence of ambiguity, the fact that inconsistent or absurd results may flow from one construction and not from another will often lead the court to adopt the latter as the most likely expressing the legislative intent.

Cohn & Rosenberger v. United States, 4 Ct. Cust. 378, 383 (Ct. Cust. App. 1913). "However, if the bare language of the statute fails to provide adequate guidance or if a literal interpretation of the statute would lead to an incongruous result," the court must turn to the statute's administrative and legislative history to glean Congress' purpose in enacting the statute. *Alaskan Arctic Gas Pipeline Co.*, 831 F.2d at 1046; see *Kung Chen Fur Corp.*, 188 F.2d at 583-84.

B. The Language of the Statutes in Question

The court notes that the statutory scheme at issue is inartfully drafted, not least because portions of it lie within the laws governing NAFTA, while other parts are embedded within the statutes on duty drawback. Subsection (j)(2) of § 1313 establishes the legal framework for substitution unused merchandise drawback, subject to the limitations set forth in paragraph (4). Paragraph (4)(A) states that "merchandise that is fungible with and substituted for imported merchandise" exported to NAFTA countries - Mexico and Canada - generally does not qualify for duty drawback. § 1313(j)(4)(A). In other words, subsection (j)(4)(A) precludes "substitution unused merchandise drawback" for merchandise exported to NAFTA countries. This prohibition, though, is subject to the exceptions listed in "paragraphs (1) through (8)" of § 3333(a). *Id.*

However, the parties disagree over whether the dependant clause in paragraph (4)(A) that cross-references the § 3333(a) exceptions ("the dependant clause") modifies the first or second "merchandise" in the sentence. Merck claims that the dependant clause modifies the first "merchandise" in paragraph (A) and therefore exempts "the fungible substitute exports" from the substitution unused merchandise drawback restrictions. Pl.'s Mot. Summ. J. 2. To fall within the substitute unused merchandise drawback exception, then, only *the exports* - and not the designated merchandise upon which one bases a drawback claim - would need to fall within a § 3333(a) exception. Defendant insists that the dependant clause modifies the second "merchandise," the "imported merchandise" upon which a duty drawback claim is based. Def.'s Mot. Summ. J. & Resp. Pl.'s Mot. Summ. J. 10-11. This construction would necessitate that *the designated*

merchandise fall under one of the exceptions in § 3333(a) to qualify for substitute unused merchandise drawback.

According to conventional grammatical methods of statutory construction, Plaintiff's argument fails. The last antecedent rule instructs that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Since the second, "imported merchandise" immediately precedes the dependant clause, Defendant's reading conforms to the rule, and Merck's does not. Further, as Defendant notes, Congress could have moved the dependant clause to create Merck's interpretation unambiguously.

[T]he drafters would have moved the limiting clause forward . . . to modify the substitute "merchandise" as follows[:]

. . . the exportation to a NAFTA country of merchandise, *other than merchandise described in paragraphs (1) through (8) of section 203(a) of that Act* [19 U.S.C.A. § 3333(a)], that is fungible with and substituted for imported merchandise shall not constitute an exportation for purposes of paragraph 2 [sic].

Def.'s Mot. Summ. J. & Resp. Pl.'s Mot. Summ. J. 13 (third brackets in original).

Nevertheless, both parties separately note, and not without reason, that their opponent's reading of § 1313(j) in conjunction with the § 3333(a) exceptions leads to ambiguous, absurd results and renders impotent portions of the statutory scheme. See Pl.'s Mot. Summ. J. 15, 19, 21-28; Def.'s Mot. Summ. J. & Resp. Pl.'s Mot. Summ. J. 14-16; Def.'s Reply 11. Thus, the court must examine the legislative history and administrative regulations, so that it may interpret the statute to give the fullest possible effect and meaning to its language and the intent of Congress. See *Nat'l Lead Co. v. United States*, 252 U.S. 140, 145 (1920); *Cohn & Rosenberger*, 4 Ct. Cust. at 380; cf. *Barnhart*, 540 U.S. at 26 (noting that last antecedent rule "not an absolute and can assuredly be overcome by other indicia of meaning").

B. Legislative History and Congressional Intent

The legislative history for the NAFTAIA affirms that in amending the duty drawback statutes in 1993, Congress intended to "restrict[] drawback and duty deferral programs between [NAFTA] Parties . . . except for those categories of goods specifically enumerated" and that Customs' interpretation of the statutes at issue reflects this intent. H.R. Rep. No. 103-361(I), at 39 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2589. Specifically, the Implementation Act aimed to

eliminate[] . . . "same condition substitution drawback [substitution unused merchandise drawback]" by amending section

313(j)(2) of the Tariff Act of 1930 (19 U.S.C. [§] 1313(j)(2)), thereby eliminating the right to a refund on the duties paid on a dutiable good upon shipment to Canada or Mexico of a substitute good, except for goods described in paragraphs one through eight of section 203(a) [19 U.S.C. § 3333(a)].⁹

Id. at 39–40; *see* 139 Cong. Rec. S16092-01, S16098 (daily ed. Nov. 18, 1993) (Statement of The Committee on Finance on S. 1627 The North American Free Trade Agreement Implementation Act (NAFTA)) (“[D]rawback may not be paid on exports to a NAFTA country of merchandise that is fungible with and substituted for imported merchandise. [The NAFTAIA] eliminates ‘same condition substitution’ drawback on trade among NAFTA Parties.”). By abolishing “substitution unused merchandise drawback,” Congress desired to “remove the trade distorting provisions of the drawback laws . . . between NAFTA countries . . . [and] ensure that none of the NAFTA countries [became] an ‘export platform’ for materials produced in other regions of the world.” H.R. Rep. No. 103–361(I), at 40; *see id.* As legislative history makes amply clear, Congress undoubtedly sought to eliminate nearly all substitute unused merchandise drawback on exports to Mexico and Canada. Merck cannot reconcile its proposed construction of 19 U.S.C. § 1313(j)(4)(A) with this unambiguous statement of intent.

C. Administrative Regulations

Customs’ regulations and Headquarters Rulings are consistent with the statutory construction that it advocates in this case, and the court must therefore treat them with substantial deference. 19 C.F.R. § 181.41 establishes the framework for the agency’s application of the duty drawback laws modified by the NAFTAIA. Sections 181.42(d) and 181.44 proceed to implement the NAFTA drawback restrictions, and § 181.45 provides for the 19 U.S.C. § 3333(a) exceptions to the general rule. *See* 19 C.F.R. §§ 181.41, 181.42, 181.44, 181.45; *see also* HQ 228209 of Apr. 12, 2002, at *3–4; HQ 227876 of Aug. 21, 2000, at *2–3; HQ 228421 of May 5, 2000; HQ 227272 of May 1, 1997, at *3 (“[W]ith the exceptions specifically provided for in 19 U.S.C. [§] 3333(a)(1) through (8) . . . , substitution drawback under 19 U.S.C. [§] 1313(j)(2) no longer exists for shipments to Canada or Mexico of merchandise imported into the United States.”). *See*

⁹With no hint of irony, Plaintiff insists that this paragraph supports its position by implicitly invoking the last antecedent rule and claiming that the clause “except for goods described in paragraphs one through eight of section 203(a)” modifies “substitute good.” *See* Pl.’s Mot. Summ. J. 31. This reading would allow for § 3333(a) exemptions as long as the exports, and not the designated merchandise upon which one bases a drawback claim, fall within the statute. Unfortunately for Plaintiff, the last antecedent rule is a cannon of statutory construction and does not apply to legislative history.

generally 58 Fed. Reg. 69,460-01, 69,463 (Dec. 30, 1993) (detailing purpose of NAFTA duty drawback regulations).

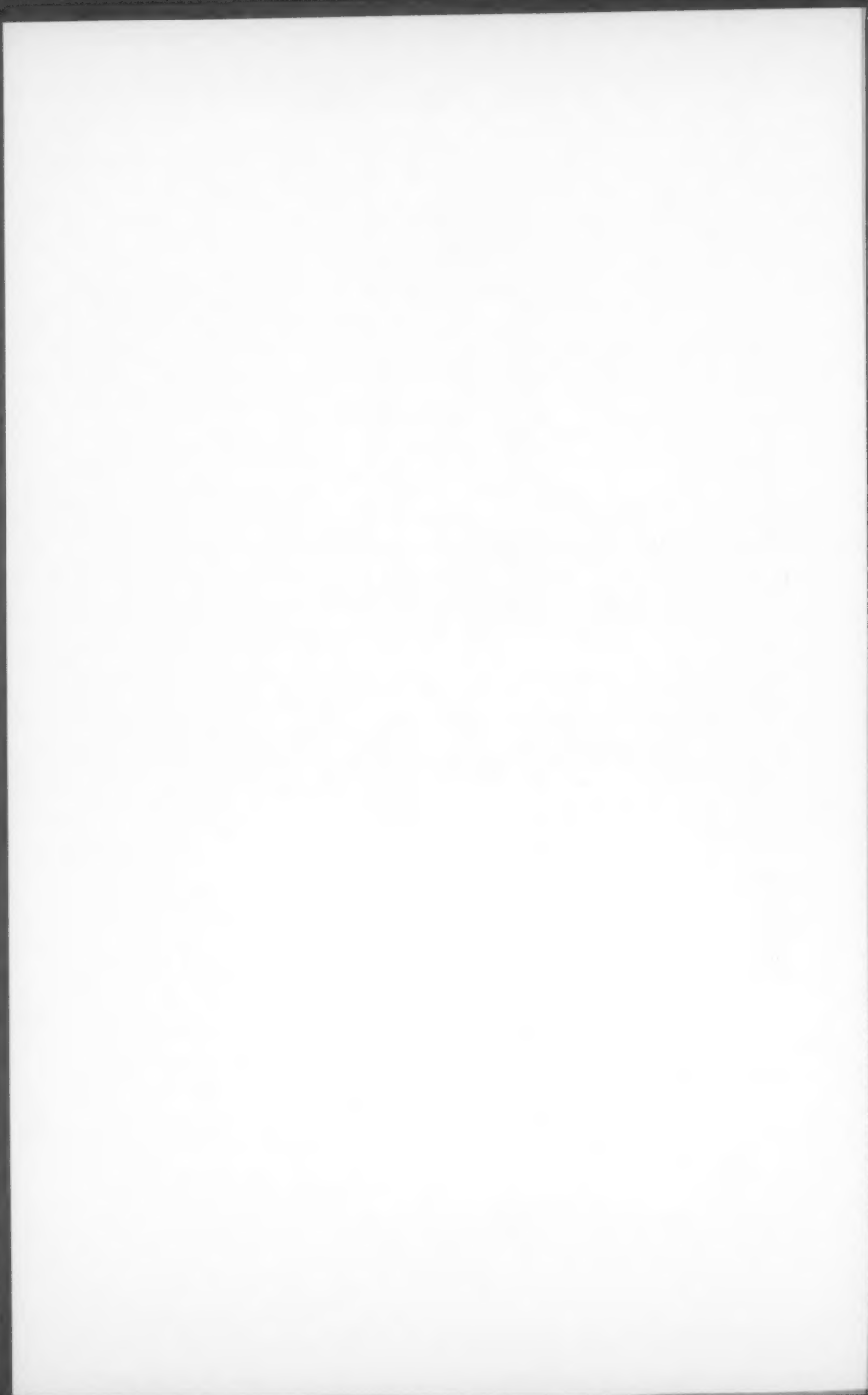
Since the court finds that Customs' duty drawback regulations reflect Congress' intent in enacting the NAFTAIA, they "should not be disturbed." *Nat'l Lead Co.*, 252 U.S. at 146; see *Barnhart*, 540 U.S. at 26 ("[W]hen the statute 'is silent or ambiguous' we must defer to a reasonable construction by the agency charged with its implementation.") (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)); see *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392-94 (1999); see also 19 U.S.C. § 1500(b) (charging Customs with power to fix rate of duty applicable to imported goods).

IV. Conclusion

Though some literal readings of the statutory scheme regulating duty drawback within the NAFTA area can lead to conflicting or absurd results regardless of how one construes the statutes' ambiguous portions, the interpretation reflected in the relevant regulation promulgated by Customs to interpret the statute (and argued by Defendant's brief) most closely conforms to the Congressional intent outlined in the legislative history. Accordingly, the court finds Defendant's interpretation of 19 U.S.C. § 1313(j)(4)(A) valid and affirms its denial of Merck's duty drawback claim. Defendant's motion for summary judgment is granted, and Merck's motion for summary judgment is denied.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY & MERCHANDISE
C06/13 3/14/06 Carman, J.	GN Netcom, Inc.	05-00016	8518.40.20 4.9% 8390.80 4.9%	8517.90.38 Free of duty	Agreed statement of facts	New York Telephone headset amplifiers and printed circuit board assemblies
C06/14 3/16/06 Carman, J.	Gen. Binding Corp.	04-00030	8472.90.95 1.5% 7326.90.85 2.5% 8214.90.90 1.4% each + 3.2%	8441.10.00 Free of duty	Agreed statement of facts	Los Angeles Pencil sharpeners and paper trimmers
C06/15 5/30/06 Aquilino, J.	Church & Dwight Co.	04-00352	3824.90.40 4.6%	3823.19.20 Various rates	Agreed statement of facts	New Orleans San Francisco Palm fatty acid distillate
C06/16 5/30/06 Aquilino, J.	Church & Dwight Co.	05-00077	3824.90.40 4.6%	3823.19.20 Various rates	Agreed statement of facts	New Orleans San Francisco Palm fatty acid distillate
C06/17 5/30/06 Aquilino, J.	MBM Co.	04-00425	7117.19.90 11%	7116.20.05 3.3% 7113.11.50 5%	Agreed statement of facts	Chicago Various styles of jewelry



Index

Customs Bulletin and Decisions
Vol. 40, No. 26, June 21, 2006

CBP Decisions

	CBP No.	Page
Closing of the Port of Noyes, Minnesota, and extension of the limits of the Port of Pembina, North Dakota	06-15	1

General Notices

CUSTOMS RULINGS LETTERS AND TREATMENT

	Page
Tariff classification:	
Proposed modification of two ruling letters and revocation of treatment	
Certain wire harnesses and NAFTA eligibility	5

U.S. Court of International Trade

Slip Opinions

	Slip Op. No.	Page
Abitibi-Consolidated Inc. and its Affiliates Abitibi-Consolidated Company of Canada, Produits Forestiers Petits Paris Inc., Produits Forestiers La Tuque Inc., Produits Forestiers Saguenay Inc., Societe En Commandite Opitciwan; and Canfor Corporation and its Affiliates Canfor Wood Products Marketing Ltd., Canadian Forest Products, Ltd., and Bois Daaquam Inc. (a/k/a Daaquam Lumber Inc.), Lakeland Mills Ltd., and Winton Global Lumber Ltd. (formerly The PAS Lumber Company Ltd.) v. United States	06-83	35
Zhejiang Native Produce & Animal By-Products Import & Export Corp., et al. v. United States	06-85	46
Merck & Co., Inc. v. The United States	06-86	47

Abstracted Decisions

	Decision No.	Page
Classification	C06/13 Through C06/17	57

